Supreme Court of the United States

OCTOBER TERM, 1957

No. 96

TOM ESKRIDGE, *Petitioner,*

vs.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1956
CERTIORARI GRANTED APRIL 1, 1957

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

A. OPINION BELOW

There is no reported opinion of the Supreme Court of the State of Washington in support of its order (R. 32) denying petitioner's application for a writ of habeas corpus.

B. JURISDICTION

Jurisdiction of this Court is invoked under 62 Stat. 929, 28 U.S.C. §1257 in that it is contended that the validity of a state statute is drawn in question on the ground of its being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and rights and privileges of petitioner are specially set up or claimed under the provisions of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's application for a writ of habeas corpus was denied by order of the court below on September

21, 1956 (R. 32), and upon motion for rehearing *en banc* filed October 8, 1956 (R. 34-35), the order denying petition for rehearing was entered October 24, 1956 (R. 35). Within ninety days thereafter as required by 62 Stat. 961 as amended, 28 U.S.C. §2101(c), petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari were filed in this Court on November 7, 1956, and certiorari was granted on April 1, 1957 (R. 97).

C. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States under which petitioner's rights and privileges are asserted provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Petitioner asserts the invalidity of §5, Chapter 126, Washington Laws of 1913, Rem. Rev. Stat. §42-5, providing as follows:

> "When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into long hand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten

transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: *Provided,* That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act."[1]

[1] Amended by §5, Ch. 69, Washington Laws of 1943, R.C.W. 2.32.240, the proviso now reading as follows:

"Provided, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the court are paid."

3. Consideration of this case also involves the following constitutional provisions, statutes and rules of the Supreme Court of the State of Washington, the texts of which are set forth in Appendix A:

(a) Constitution of the State of Washington, Art. I, §22, as amended by Amendment 10.

(b) Statutes

Wash. Laws 1893, Ch. 61, §4, as amended by Wash. Laws 1901, Ch. 31, §2; Rem. Rev. Stat. §1729.

Wash. Laws 1913, Ch. 116, §§1, 2, as amended by Wash. Laws 1915, Ch. 104; Rem. Rev. Stat. §§1730-1, 1730-2.

Wash. Laws 1893, Ch. 60, §§7, 8, 9, 11; Rem. Rev. Stat. §§387, 388, 389, 391.

Wash. Laws 1913, Ch. 126, §5; Rem. Rev. Stat. §42-5.

(c) Court Rules

Rules of the Supreme Court (effective April 1, 1931):

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Rule XII, 193 Wash. 14a.

Rules on Appeal (effective January 2, 1951):

Rule 47, 34A Wn.(2d) 53; R.C.W. vol. 0.

D. QUESTIONS PRESENTED

Petitioner, a person without funds, was denied a statement of facts or transcript of trial proceedings which was necessary to the prosecution of his appeal to review errors in the trial proceedings claimed in good faith, the denial of petitioner's application being based upon Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913, providing that the trial judge "if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter" at public expense.

The questions presented are whether petitioner, because of poverty, was denied appellate review by the State of Washington available to others in violation of the due process and equal protection clauses of the Fourteenth Amendment (a) in that he was denied a statement of facts or transcript of proceedings necessary to the prosecution of his appeal and (b) in that he was not furnished with counsel on appeal.

E. STATEMENT OF THE CASE[2]

1. On October 17, 1935, information was filed in the Superior Court of the State of Washington for Spokane County charging petitioner with the crime of murder

[2] Paragraphs of the Statement of the Case have been numbered to facilitate reference in subsequent portions of this brief.

in the first degree (R. 89, 15). Upon arraignment on that date, counsel was appointed by the trial court to defend petitioner (R. 39) who thereafter moved unsuccessfully "for an extension of time, or a continuance ... in order that the said attorneys might have sufficient time to prepare a proper and legal defense" (R. 39). Following a trial of nine days commencing November 4, 1935 (R. 60, 77, 18), the petitioner, on verdict of the jury (R. 36) was found guilty of murder in the first degree on November 13, 1935. A special verdict recommended against imposition of the death penalty (R. 37). Following the denial of petitioner's motion for a new trial and motion for an order in arrest of judgment on November 29, 1935 (R. 43-44), judgment and sentence were pronounced on December 14, 1935, committing petitioner to confinement at hard labor in the Washington State Penitentiary for the term of his natural life (R. 44-45) where he began serving his sentence on December 16, 1935 (R. 7, 84). Petitioner gave oral notice of appeal to the Supreme Court of Washington in open court at the time of imposition of sentence (R. 45).

2. Thereafter on December 30, 1935, petitioner, without benefit of counsel (R. 26) and by letter addressed to the trial judge, advised that he was without funds to finance the appeal of his case to the Supreme Court of the State of Washington and requested the trial court to "grant me a transcript of all the records in my case" (R. 46-47). Petitioner also filed an affidavit bearing the same date stating that he was without "money or funds with which to secure a transcript of the evidence in said case" and asserting that "I believe that I have just and

sufficient grounds for an appeal in said case, and desire to perfect such an appeal" (R. 49). The prosecuting attorney of Spokane County moved "for an order denying the application for transcript at the expense of Spokane County" (R. 47) asserting "that the ends of justice would not be served by the granting of an application for a transcript of the record at the expense of Spokane County; . . . that it is believed that Spokane County is not justified in incurring the expense of getting out a transcript in this case; that the matter of appeal is not a matter of right, but a pure matter of discretion" (R. 48).

3. Being without funds and without benefit of counsel (R. 50) and being unable to be present at the hearing upon his application (R. 52), petitioner supplemented his application with a motion that the county furnish him the "records and files" in the cause "without cost to said defendant" (R. 57) and supplemented his request with a further affidavit setting forth further "grounds for said appeal" (R. 54-57).

4. The prosecuting attorney again moved for an order denying petitioner's request (R. 58) and in affidavit stated (R. 58-59) "that justice would not be promoted by furnishing the defendant with a free statement of facts to be made by the official court reporter and paid for by the County Treasurer" and "that the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 59). The State did not contend that a stenographic transcript of the testimony was unnecessary to review the questions which petitioner had indicated he desired to review nor did

the State contend that the appeal was frivolous or that it was not taken in good faith.

5. On January 20, 1936, the trial judge "Ordered, That the application for transcript at the expense of Spokane County be, and is, hereby denied, for the reason that in the opinion of the Court, justice would not be promoted by furnishing the defendant with a free Statement of Facts to be made by the Official Reporter and paid for by the County Treasurer, in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein" (R. 62-63).

6. Thereafter, on February 14, 1936, petitioner filed on his own behalf in the Supreme Court of the State of Washington (Cause No. 26088) a "Motion for Writ of Mandate" (R. 64-65) and a "Petition for Writ of Mandate" (R. 68-70) together with supporting affidavits (R. 65-68, 70-71) reciting that he was without funds with which "to secure a transcript of the evidence and/or an abstract of the record of said cause" (R. 66) or to secure "the assistance of counsel to prosecute an appeal on said conviction" (R. 69), and that he was "thereby unable to perfect affiant's appeal from said verdict and judgment and affiant will thereby be deprived of his constitutional rights to a fair and impartial trial of said charge" (R. 66). Petitioner requested that the Supreme Court of the State of Washington issue its writ of mandate ordering the trial judge "to enter an order in said criminal cause . . . [that] Spokane County . . . furnish to Relator a transcript of the evidence and an abstract of the record of said cause.

And for such other and further relief as may be meet in the premises" (R. 70).

7. The Petition for Writ of Mandate was submitted to the Supreme Court of the State of Washington upon relator's petition (R. 72) and the transcript of record furnished by the trial court (R. 64) by direction of the prosecuting attorney (R. 63-64). The motion docket entry denying the Petition for Writ of Mandate was entered April 24, 1936 (R. 72, 74) and judgment was entered May 27, 1936, denying the writ (R. 72).

8. Meanwhile, on April 15, 1936 (R. 75) the Prosecuting Attorney for Spokane County moved in the Supreme Court of the State of Washington for an order dismissing petitioner's appeal to that court (Cause No. 26179) "for the reason that the appeal heretofore taken from the conviction, judgment and sentence of the trial court in said cause has not been perfected by filing in the above court a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief within the statutory time, as provided by the court in Rule 17 of Rules of Court" (R. 76). The motion to dismiss and petitioner's Petition for Writ of Mandate "followed each other on the motion calendar" on April 24, 1936 (R. 78) and upon a docket entry granting the motion to dismiss (R. 79), judgment dismissing petitioner's appeal was entered May 27, 1936 (R. 79).

9. On July 25, 1956, petitioner filed a Motion for Leave to Proceed *in Forma Pauperis* (R. 5) and a Petition for a Writ of Habeas Corpus (R. 6-14) in the Supreme Court of the State of Washington. The request to proceed *in forma pauperis* was granted on July 25,

1956 (R. 6), respondent filed answer denying the allegations of the petition (R. 15) and thereafter the Petition for Writ of Habeas Corpus was denied on September 21, 1956 (R. 32) without opinion. A Motion for Rehearing *En Banc* (R. 34) was thereafter denied on October 24, 1956 (R. 35). This Court granted petitioner's Motion for Leave to Proceed *in Forma Pauperis* and his Petition for Writ of Certiorari on April 1, 1957 (R. 97), 353 U.S. 922, 1 L.ed.(2d) 719.

10. Petitioner stated in support of his application to the trial court for a transcript of the evidence that "I believe I have just and sufficient grounds for an appeal in said case, and desire to perfect such an appeal" (R. 49). Both in his affidavit in support of this application for transcript (R. 54-57), and in his affidavit in support of his application for a writ of mandate in Cause No. 26088 (R. 65-68), petitioner delineated these grounds for appeal as including, among others "disregard of the evidence adduced at said trial and of the law as laid down by the Court in the instructions, by the jury . . . and that said verdict was rendered on such passion and prejudice and not upon the law and evidence in said case" (R. 55, 66); that the jury "disregarded the law as laid down in the following instructions, and portions thereof . . . " (R. 55, 66); "refusal of the presiding judge to grant defendant . . . sufficient time in which to prepare this affiant's defense" (R. 55, 66-67); "newly discovered evidence" (R. 56-57, 67); and "that certain of the evidence given by certain of the witnesses . . . was false and untrue, and known to be so . . . That upon a new trial affiant will be able to produce evidence to establish the fact that such perjury was committed . . .

respecting certain material facts and issues in said case" (R. 57, 67).

11. In the Motion for New Trial (R. 37-38), filed on petitioner's behalf by the counsel appointed by the court to represent him at the trial (R. 39), the grounds for new trial were asserted to be (R. 37-38):

> "1. Newly-discovered evidence, material for the defendant which he could not have discovered with reasonable diligence and produced at the trial.
>
> "2. Accident and surprise.
>
> "3. Error of law occurring at the trial and accepted [sic] to by the defendant.
>
> "4. Misconduct of the jury.
>
> "5. That the jury received evidence, papers and documents not allowed by the Court.
>
> "6. That the verdict is contrary to law and evidence."

And in Motion for an Order in Arrest of Judgment filed by appointed counsel the asserted grounds included "that evidence was introduced in the case which was entirely collateral to the issues involved and excepted to by the defendant," and "that there was a material variance between the allegations of the information and the proof adduced at the trial as to amount to an entire failure of proof at the trial" (R. 41).

12. The affidavit by petitioner's appointed counsel in support of a Motion for Extension of Time to File Affidavits in Support of Motion for New Trial states that "the time was so short that the attorneys for the defendant herein were not able to make as [sic] complete and satisfactory investigation of all the facts surrounding the alleged crime and, because of the shortness of

time, they were not able to properly prepare the defense upon the charge" (R. 39). Counsel further stated that "the attorneys for the defendant were compelled to go to trial without adequate and proper preparation due to the refusal of the court to grant sufficient time for the preparation of defendant's case" (R. 40) and that "newly-discovered evidence is material and a large portion of it has come to these attorneys subsequent to the submission of the cause to the jury" (R. 40). Counsel's affidavit concludes: "Subsequent to the rendering of the verdict this affiant and his associate have secured information that in their opinion if presented to the court, with proper time to complete the investigation would completely exonerate this defendant from the charge upon which he was tried" (R. 40).[3]

13. Petitioner's application for a writ of habeas corpus in the court below called attention to the decision of this Court in *Griffin v. Illinois*, 351 U.S. 12, 100 L.ed. 891 (1956) (R. 7, 17, 22), and asserted that he "was denied the right to appeal as afforded others under the Constitution of the State of Washington" (R. 7, 17, 23). Pointing out that he was "not trained in legal proceedings or in the language of the law" petitioner asserted the unconstitutionality of R.C.W. 2.32.240 (R. 9), contended that "the accused in criminal prosecutions shall have the right to counsel" (R. 9) and that the denial of his application for a transcript of the trial proceedings by the trial court resulted in the denial of appellate review because he was a "poor person" (R. 12). Petitioner thus claimed that he "was denied due

[3] A further elaboration of the grounds of appeal asserted by petitioner is set forth in a prior petition for a writ of habeas corpus (R. 83-84).

process of law and the equal protection of the laws" in violation of his rights under the Fourteenth Amendment to the Constitution of the United States (R. 9, 10, 14, 17, 22-23).[4]

F. SUMMARY OF ARGUMENT

Petitioner in good faith claimed errors in the trial proceedings that were not reviewable on appeal from his judgment of conviction upon a "clerk's record" (which the State even refused to furnish him). Such errors could be reviewed under Washington procedure only upon the filing of a complete "statement of facts" covering the trial proceedings. Although Washington, like Illinois in *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891 (1956), authorized a "statement of facts" (the filing of which was in Washington a jurisdictional prerequisite to petitioner's appeal) in narrative form as well as by verbatim transcript, petitioner was denied a "statement of facts" in any form, or a transcript of the trial proceedings from which one could have been prepared, upon his application for a transcript of the trial proceedings under Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913, which authorized the trial judge to provide indigent defendants a stenographic transcript of the trial proceedings at public expense "if in his opinion the ends of justice will thereby be promoted."

A statement of facts was also essential to the preparation of an "abstract of record" and compliance with other requirements of Washington appellate procedure. Petitioner was not afforded any other means of pre-

[4] See also R. 82 and R. 84 with respect to petitioner's like contentions in a prior application for a writ of habeas corpus.

paring a "statement of facts" nor was he afforded the assistance of counsel with which to make an attempt and the trial judge as well as the State viewed a stenographic transcript of the trial proceedings as an indispensable prerequisite to an appeal by petitioner which they considered not to be a "right" of petitioner but "a pure matter of discretion" of the trial court.

Washington construed Rem. Rev. Stat. §42-5 to vest "almost absolute discretion" in the trial court to determine whether a transcript of proceedings should be furnished indigent defendants and therefore, because of poverty, petitioner's "right to appeal" guaranteed by Article I, §22, and Amendment 10 of the Constitution of the State of Washington was subjected to the "almost absolute discretion" in the trial court to determine whether a transcript of proceedings should be furnished indigent defendants. Thus, because of poverty, petitioner's "right to appeal" guaranteed by Article I, §22, and Amendment 10 of the Constitution of the State of Washington was subjected to the "almost absolute discretion" of the trial judge whose errors he sought to review, whereas the right to appeal of defendants who had money enough to buy transcripts was not.

Petitioner was not afforded benefit of counsel in his efforts to obtain appellate review of the errors in the trial proceedings which he claimed and the intricacies of Washington criminal appellate procedure were such that destitute defendants without benefit of counsel were not afforded as adequate appellate review as defendants who had money enough to buy transcripts or retain counsel.

Washington accordingly denied petitioner equal protection of the laws and due process in violation of the rights guaranteed him under the Fourteenth Amendment as recognized by this Court in *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891 (1956).

G. ARGUMENT

BECAUSE OF POVERTY PETITIONER WAS DENIED APPELLATE REVIEW BY THE STATE OF WASHINGTON IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Article I, §22, of the Constitution of the State of Washington, as amended by Amendment 10, provides that "in criminal prosecutions, the accused shall have . . . the right to appeal in all cases. . . ."[5]

Having established that right, the inquiry here presented is whether Washington's scheme of statutory provisions and court rules governing criminal appellate procedure as applied to the appeal of this petitioner in 1935 met the test of effective appellate review and the rule announced by this Court in *Griffin v. Illinois,* 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956), "that destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

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[5] The further declaration is contained:

"In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

I. PETITIONER WAS NOT FURNISHED A STATEMENT OF FACTS OR TRANSCRIPT OF TRIAL PROCEEDINGS

1. A Statement of Facts or Transcript of Proceedings Covering the Trial Was Necessary for Adequate and Effective Appellate Review of Petitioner's Judgment of Conviction

(a) Washington criminal appellate procedure in 1935

(i) *The "Clerk's Record"*

Washington in 1935, like Illinois as disclosed in *Griffin*, made provision for a "clerk's record" on appeal. Rem. Rev. Stat. §1729; Ch. 61, §4, Wash. Laws of 1893; as amended Ch. 31, §2, Wash. Laws of 1901; Rule X, Rules of Practice, 2 Rem. Rev. Stat. §308-10, 159 Wash. lxiv (See Appendix A). At least until 1938,[6] and possibly thereafter,[7] this "clerk's record" in all criminal appeals prosecuted *in forma pauperis* was required to be furnished the appellant at the expense of the county. Rem. Rev. Stat. §1729 and Rule X(2) Rules of Practice, 159 Wash. lxiv. Since that time, however, except in capital cases subsequent to 1950 where the death penalty has been imposed,[8] a "clerk's

[6] " . . . Rem. Rev. Stat. §1729, on which the request for a transcript of the records and files to be furnished by the clerk of the superior court at the county's expense, is apparently based, was, if not superseded by Rule of Supreme Court 12, [1938] specifically repealed in 1943; . . . " *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 110, 119, 190 P.(2d) 762, 766 (1948).

[7] Rem. Rev. Stat. §1729 was expressly repealed by Ch. 206, Laws of 1943. See, however, Rule VIII, Rules of the Supreme Court, 193 Wash. 7a (effective Aug. 1, 1938) and present Rule 44, Rules on Appeal, 34A Wn.(2d) 47 (effective January 2, 1951), R.C.W. Vol. 0, indicating that a "clerk's record" in criminal appeals prosecuted *in forma pauperis* is still required to be furnished at the expense of the county.

[8] Rule 47, Rules on Appeal, 34A Wn.(2d) 53, effective January 2, 1951 (Printed in Appendix A).

record" has not even been available to indigent defendants at the expense of the state according to the Supreme Court of the State of Washington.[9]

As in Illinois, review in Washington on a "clerk's record" is limited to those errors appearing from the face of that record and does not reach trial errors.[10]

Despite the statutory mandate that the clerk of the trial court send up to the Supreme Court "a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal" (Rem. Rev. Stat. §1729 and see Rule X, Rules of Practice, 159 Wash. lxiv), petitioner was not even afforded this opportunity for appellate review. Having requested that he be

[9] "[2] There is no authority on which this court may permit the filing of appeal *in forma pauperis*. Rem. Rev. Stat., §1729 [P.P.C. §5-37], which was cited by relator in *State ex rel. Bird v. Superior Court*, *supra*, as authority for preparation, certification, and filing of records in criminal appeals prosecuted *in forma pauperis*, at the expense of the county, was repealed by the Laws of 1943, chapter 206, p. 639, §1, Rem. Supp. 1943, §42-5.

"[3] The only assistance, at public expense, to which an indigent defendant is entitled in prosecuting an appeal, is that provided by Rem. Supp. 1943, §42-5. As stated in *State ex rel. Marr v. Superior Court*, *supra*, that statute involves more than the mere indigence of the defendant. It prescribes that, if the prescribing judge does not think justice will be promoted, he shall not order a free transcript of the evidence for the accused on appeal. It is possible, but it is not manifest, as was the situation in the case cited, that the discretion of the trial judge was abused." *State ex rel. Bird v. Superior Court*, 30 Wn. (2d) 785, 789, 194 P. (2d) 374, 376 (1948).

See note (7) above, however.

[10] The statute making provision for the preparation of abstracts of the "clerk's record" and the statement of facts expressly provided that "nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions." Rem. Rev. Stat. §1730-2; Ch. 116, §2, Wash. Laws of 1913, as amended by §2, Ch. 104, Wash. Laws of 1915 (Printed in Appendix A). See also discussions below relating to Statement of Facts in point (ii) entitled "Procedure for Review of Trial Errors."

furnished "a transcript of all the records in my case" (R. 47, see also R. 49, 51, 52, 55) the record here discloses that not even a "clerk's record" was furnished to the appellate court upon petitioner's appeal (Cause No. 26179) from his judgment of conviction (R. 73, 78). In dismissing petitioner's appeal, the court apparently "used the transcript furnished in the mandate case No. 26088" (R. 73)—a record which consisted "of so much of the record and files" in the trial court as the clerk of that court had "been directed by the Prosecuting Attorney of Spokane County to transmit to the Supreme Court of the State of Washington" (R. 63). This "clerk's record," which was "used by the Supreme Court of Washington" in dismissing petitioner's appeal in Cause No. 26179 before that court, was not only prepared by the prosecution for an entirely different purpose—it did not even contain a copy of the information (R. 36-44) upon which petitioner was prosecuted[11] and which he contended was defective! (R. 41, 46).

This petitioner was not only denied an appellate review of trial errors because of his poverty, he was denied *any* appellate review.

(ii) ***Procedure for review of trial errors***

The procedure available to petitioner in December, 1935, to review "trial errors" or errors other than those appearing from the face of the "clerk's transcript," was substantially identical with the Illinois procedure revealed in *Griffin*. In order to obtain full appellate

[11] The copy of the information contained in this record (R. 88) was filed in the office of the Clerk of the Supreme Court of Washington on May 7, 1953, as a part of the Return and Answer filed in Cause No. 32466 (R. 95).

review after the giving of his oral notice of appeal (R. 45), it was necessary for petitioner to prepare, serve, file and have certified by the trial judge a "bill of exceptions or statement of facts." Rem. Rev. Stat. §§387-389, 391, Ch. 60, Wash. Laws of 1893, §§7, 8, 9, 11; Rule III, Rules of the Supreme Court (effective April 1, 1931), 1 Rem. Rev. Stat. p. 138, 159 Wash. xxxiii; Rule VII, Rules of Practice (effective April 1, 1931), 2 Rem. Rev. Stat. §308-7, 159 Wash. lxi. (All printed in Appendix A.)

Under the provisions of Rem. Rev. Stat. §391 it was provided:

> "The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein. . . ."

In addition the petitioner was required to have typed and served upon the opposing party "an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error." Rem. Rev. Stat. §1730-1, Ch. 116, §1, Wash. Laws of 1913 as amended by Ch. 104, §1, Wash. Laws of 1915; Rule VI, Rules of the Supreme Court, 1 Rem. Rev. Stat. pp. 139-145, 159 Wash. xxxv. (Printed in Appendix A.)

The elaborate detail specified for the preparation of abstracts as well as the certification of statements of

facts or bills of exceptions is set forth in these statutory and rule provisions noted, the official text of which is set forth in Appendix A, and to which reference is herewith made in the interest of brevity.

In addition, Rule XVII, Rules of Practice, effective March 1, 1935, 178 Wash. xxxvii, provided:

> "2. No appeal in a criminal case shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:
>
> "(a) A statement of facts or bill of exceptions served on the respondent and certified by the judge of the court below according to the procedure, so near as may be, in civil cases;
>
> "(b) A transcript of record certified by the clerk of the court below, pursuant to the procedure, so near as may be, in civil cases;
>
> "(c) Appellant's abstract of record where required by the rules of the supreme court; with proof of service thereof on the respondent;
>
> "(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent;
>
> "(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.
>
> "Except as herein otherwise provided, the giving of the notice of appeal, the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief shall be jurisdictional.
>
> * * * * * * * * *

"If not so filed, the statement of facts or bill of exceptions shall not be considered; and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information."[12]

(b) Petitioner asserted trial errors which could not be reviewed on a "Clerk's Record"

The following grounds for appeal were asserted by petitioner[13] in connection with his application for a transcript at public expense (R. 46-47, 54-57), the substance of these grounds being:

(i) The information was duplicitous;

(ii) Petitioner was brought to trial too soon to prepare an adequate defense;

(iii) The verdict was contrary to the evidence and instructions;

(iv) After the trial, petitioner discovered evidence, not reasonably available before, showing that material facts in the case against petitioner were established by perjured testimony, and that petitioner was not at the scene of the crime when it was committed.

Petitioner could not have presented to the appellate court these contentions above set forth without a full transcript of record certified by the clerk of the trial

[12] Since 1933 Washington has made provision for an "agreed statement of facts" in which event the necessity of sending up a "clerk's record" is eliminated. Rule 34 (4), Rules on Appeal, 34-A Wn.(2d) 37, Vol. 0, R.C.W.

[13] Subsequently petitioner urged various additional grounds for appeal (R. 83-84). These will not be discussed herein, it being assumed for the sake of argument that petitioner was under a duty to come forward and state all reasons why a transcript and statement of facts were necessary to his appeal at the time he applied for the transcript and statement, and hence may not claim error in the denial of a transcript and statement of facts for purposes which he did not state at the time.

court, which included a complete bill of exceptions or "statement of facts," comprehending oral proceedings both before and after trial as well as nine days of trial proceedings, certified by the trial judge to contain "all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record." Rem. Rev. Stat. §391; Ch. LX, §11, Wash. Laws of 1893 (See Appendix A).

(i) ***Sufficiency of the information***

Under Washington law the accused may not on appeal attack an information as duplicitous unless he has previously raised this question in the court below. *State v. Swartz,* 108 Wash. 21, 182 Pac. 953 (1919); *State v. Pierson,* 101 Wash. 318, 172 Pac. 236 (1918), and cases cited. Hence under Washington decisions this petitioner's objection on appeal could not have been founded on the information itself, which might have been included in a "clerk's record,"[14] but had to rest upon a bill of exceptions or statement of facts establishing that this objection was unsuccessfully raised in the court below, as it appears to have been on motion before plea of not guilty (R. 60) as well as on motion in arrest of judgment (R. 41).

(ii) ***Denial of request for continuance***

It appears from the record that on or about October 26, 1935 (R. 60) the trial court denied a request for a continuance by the defense attorneys who had been appointed on October 17, 1935 (R. 39 and see R. 83). Appellate review of this ruling required not only the clerk's transcript of the papers used, but also a bill of

[14] As noted above, Note (11), not even this was furnished petitioner.

exceptions or statement of facts, certified by the trial judge, incorporating those papers, if any, by reference, and setting out all other matters on which the ruling may have been based. The mere physical presence in the transcript or "clerk's record" of affidavits submitted in connection with the motion is immaterial if they have not been made part of the bill of exceptions or statement of facts, and certified by the trial judge. *State v. Wilson*, 139 Wash. 191, 246 Pac. 289 (1926); *State v. Hooker*, 99 Wash. 661, 170 Pac. 374 (1918); *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873 (1909).

(iii) ***Sufficiency of the evidence to support the verdict***

The Supreme Court of Washington has long held that it will not consider whether the evidence is sufficient to support the verdict unless the transcript includes a statement of facts, which in turn includes *all* the evidence submitted at the trial and a proper certificate to that effect by the trial judge.[15] *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042 (1903); *State v. Webb*, 20 Wash. 500, 55 Pac. 935 (1899); *State v. Robinson*, 12 Wash. 491, 41 Pac. 884 (1895).

(iv) ***Newly discovered evidence of perjury, or of an alibi, and the right to a new trial***

On November 14, 1935, petitioner's attorneys moved for a new trial, basing the motion in part on the grounds of newly discovered evidence (R. 37-40). This motion was heard and denied on November 29, 1935 (R. 43-44). The denial of this motion could not be re-

[15] The record must further "affirmatively show that no other evidence was before the court." See *State v. Wilson*, 139 Wash. 191, 194, 246 Pac. 289, 290 (1926).

viewed on appeal without causing the statement of facts to include all proceedings on the motion. As set forth above, the mere physical presence in the clerk's transcript of one or more of the affidavits or papers used would have made no difference. *State v. Colombo*, 178 Wash. 298, 34 P.(2d) 897 (1934); *State v. Newell*, 148 Wash. 82, 268 Pac. 130 (1928); *State v. Armstrong*, 87 Wash. 275, 151 Pac. 775 (1915)

(c) Compliance with the requirements for filing abstracts and briefs necessitated a transcript of trial proceedings

As noted above, Rem. Rev. Stat. §1730-1, Ch. 104, §1, Wash. Laws of 1915, required that there be prepared, served and filed an abstract of the record *and* the statement of facts necessary for a consideration of the appeal. Reference to the detailed and elaborate provisions of Rule VI, Rules of the Supreme Court, 159 Wash. xxxv, the provisions of which are set forth in Appendix A in view of their length, readily demonstrates, we submit, the obvious necessity for a complete transcript of the proceedings to meet these requirements with respect to a trial nine days in length (R. 60, 77, 18).

Where the abstract in proper form has not been timely served and filed, the Supreme Court of Washington has consistently refused to consider the statements of facts, which as noted above was essential to this petitioner's appeal.[18] *State v. Hampson*, 9 Wn.(2d)

[18] The question may perhaps be posed whether petitioner would have had the ability to comply with the rule as to abstracts, even if a transcript and statement of facts had been duly supplied to him—at least without the assistance of counsel. The rule as to abstracts was abrogated in 1942, see 11 Wn.(2d) xvii and Rem. Rev. Stat. (1943 supp.) pp. 2-3, seemingly in recognition of the burden imposed upon even the general run of litigants and their counsel.

278, 114 P.(2d) 992 (1941); *Morsbach v. Thurston County*, 152 Wash. 562, 278 Pac. 686 (1929); *Ollar-Robinson Co. v. O'Neill*, 80 Wash. 1, 141 Pac. 194 (1914).

Rule VIII, Rules of the Supreme Court, 1 Rem. Rev. Stat. p. 146; 159 Wash. xliii (set forth in Appendix A), further required the filing of printed briefs in which "each error relied on shall be clearly pointed out and separately discussed" and which "shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the abstract for verification in all instances where an abstract is required. In other instances, the reference shall be to the original record." Without such brief, petitioner's appeal would have resulted in an affirmance being directed in accordance with the provisions of Rule 16, Rules of the Supreme Court, 1 Rem. Rev. Stat. p. 149; 159 Wash. xlviii (See Appendix A). See *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939).

Under the provisions of Rule 17, Rules of Practice, quoted above; the transcript, certified statement of facts or bill of exceptions, abstract of record and opening brief all had to be filed with the clerk of the Washington Supreme Court "within sixty days after giving notice of appeal," and furthermore, such filing was "jurisdictional." The disastrous consequences of failing to comply with these requirements suffered by appellants seeking to act as their own counsel are illustrated by *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939) and *State v. West*, 197 Wash. 595, 86 P.(2d) 192 (1939).

The time requirements of Rule XVII were strictly enforced by the Supreme Court of Washington.[17] *State v. Hampson,* 9 Wn.(2d) 278, 114 P.(2d) 992 (1941); *State v. Nelson,* 6 Wn.(2d) 190, 107 P.(2d) 1113 (1940); *State v. Marcy,* 189 Wash. 493, 65 P.(2d) 1271 (1937); *State v. Silvia,* 195 Wash. 16, 79 P.(2d) 639 (1938). No extensions of time for other requirements could be obtained without the filing of appellant's proposed statement of facts in the trial court within the sixty-day period and this proposed statement of facts thus filed had to be substantially complete. After the sixty-day deadline it could not be "supplemented" although it could be "amended." *State v. Sherwood,* 166 Wash. 160, 6 P.(2d) 595 (1932); *Johnson v. Washington Trust Co.,* 33 Wn.(2d) 84, 204 P.(2d) 505 (1949); see *Livermore v. Northwest Airlines, Inc.,* 6 Wn.(2d) 1, 20-21, 106 P.(2d) 578, 587 (1940).

Thus, petitioner's appeal depended not simply upon his filing a proposed statement of facts, on the order of at least six or seven hundred pages in length for a nine-day trial, but upon his doing this, regardless of all hazards, within sixty days after he gave notice of appeal on December 14, 1935 (R. 45). This record is clear that neither the petitioner nor anyone else considered this to be a possibility unless he were furnished a statement

[17] The state supreme court later tacitly acknowledged that these time limitations operated too harshly. In 1944 the time period was extended from sixty to ninety days. Rule 12, Rules of the Supreme Court, effective February 18, 1944, Rem. Rev. Stat. (1945 supp.) 11, 18 Wn.(2d) 14-a. Still later, Rule 12, Rules on Appeal, effective January 2, 1951, 34A Wn.(2d) 50-51, characterized the filing and service of the proposed statement of facts, theretofore said to be "jurisdictional," as "steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired" by the supreme court.

of facts prepared by the official court reporter at public expense. The trial judge considered, as the prosecuting attorney frankly stated, that the right of appeal for an indigent defendant was "not a matter of right, but a pure matter of discretion of the court" (R. 48, 59).

2. No Equivalent or Other Means Than a Statement of Facts or Complete Transcript of Proceedings Was Afforded or Available to Petitioner

In *Griffin*, Illinois had neither by statute nor court rule required the filing of a stenographic transcript of the trial proceedings as a part of the bill of exceptions or statement of facts covering the entire trial proceedings. Nor has Washington. Petitioner in *Griffin* alleged that the stenographic transcript of the trial proceedings was "needed to prosecute an appeal,"[18] and these allegations were not denied. Respondent here has, by a general denial (R. 15), traversed the petitioner's allegations that the denial of his application for a "transcript of the trial" under the authority of Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913 (now R.C.W. 2.32.240) deprived him of Constitutional rights under the Fourteenth Amendment in that he was "denied appellate review on account of being a poor person" (R. 8, 9, 12, 14).

The record here demonstrates the need of this petitioner for a transcript of the trial proceedings as well as the "clerk's record" if he is to be afforded effective appellate review. As indicated above, the errors which petitioner has asserted require for their appellate review a bill of exceptions or statement of facts covering

[18] *Griffin v. Illinois*, 351 U.S. 12, 13, 16, 100 L.ed. 891, 896, 897 (1956).

the entire trial proceedings. Whether or not the obligations of the Fourteenth Amendment could be met by furnishing petitioner something less than a stenographer's transcript of the trial proceedings is a question which this case does not present. See *Griffin v. Illinois*, 351 U.S. 12, 20, 100 L.ed. 891, 899 (1956); and see *Johnson v. United States*, 352 U.S. 565, 566, 1 L.ed.(2d) 593, 594 (1957); *Farley v. United States*, 354 U.S. 521, 522-523, 1 L.ed.(2d) 1529, 1531 (1957). Petitioner's application to the trial court for a "transcript" was construed by the prosecution to be for a "free statement of facts" (R. 59) and the trial court denied petitioner's application for a "transcript on appeal" for the reason that in the court's opinion "justice would not be promoted by furnishing the defendant with a free Statement of Facts to be made by the Official Reporter and paid for by the county treasurer" (R. 62-63). In short, because of poverty, petitioner was denied a "statement of facts" which was an indispensable condition precedent and jurisdictional prerequisite to the perfection of his appeal.[19] Without a "statement of facts" which was denied him, petitioner's appeal failed (R. 79) and it matters little whether that "statement of facts" could be by way of stenographer's transcript or some other "equivalent" such as the "trial judge's notes or an agreed statement by trial counsel."[20] No other "equivalent" was made available to petitioner and no suggestion was made by the prosecutor or trial court that any thing short of a complete transcript of the trial pro-

[19] Rule XVII, Rules of Practice, 178 Wash. xxxvjii; see also Appendix A.

[20] See *Johnson v. United States*, 352 U.S. 565, 566, 1 L.ed.(2d) 593, 594 (1957).

ceedings would serve to afford petitioner appellate review of the errors he asserted. Indeed, both the prosecutor and the trial judge considered that the petitioner's right to a "statement of facts"—in short his right to an appeal—was a matter solely within the discretion of the trial court, the prosecutor stating in his affidavit in opposition to petitioner's application, as has been noted, "the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 59).

The Supreme Court of Washington has recently suggested by way of dictum that a "complete answer" to a request by an indigent petitioner in the State of Washington for a stenographic transcript of the trial proceedings lies in the fact that the "statement of facts may be in narrative form, and need not be in the form of a verbatim reproduction of all that transpired during the trial of the cause." *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 811, 314 P.(2d) 930, 934 (1957). That even the court recognized the overstatement implicit in its suggestion is evidenced by the fact that the court, with its eye upon R.C.W. 2 32.240, added, "If a complete record is required on appeal, a convicted defendant has only to show a reason therefor, whereupon the law authorizes the trial court to order it at public expense."[21]

Not only has Washington long recognized that a bill of exceptions or statements of facts may be in narrative form[22] rather than by question and answer, but such is

[21] *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 812, 314 P.(2d) 930, 934 (1957).

[22] *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940); *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252.

also true of the decisions of Illinois cited in *Griffin*.[23] Historically it would seem that a narrative statement was customarily employed in the preparation of bills of exceptions before the advent of modern court reporting systems.[24]

Neither under the procedure of Washington in 1935 nor that of Illinois in *Griffin*, was a stenographic transcript of the trial proceedings a legal prerequisite to an appellate review of trial errors. *Griffin* held, however, that its denial abridged the constitutional rights of indigent defendants. Counsel for Illinois did not even suggest that "a narrative transcript would necessarily or even generally be the equivalent of a verbatim transcript of all of the trial"[25] and we think that few experienced trial counsel would equate them.

In 1913[26] Washington created its official court re-

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[23] See cases collected in opinion of Mr. Justice Black, 351 U.S. 12 at 14, n. 4, 100 L.ed. 891 at 896, and in dissenting opinion of Mr. Justice Harlan, 351 U.S. at 30, 31, nn. 2, 3, 100 L.ed. at 905.

[24] "It has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence. Even so, the bill ought not to contain all of the evidence but only that which is relevant to the issues made upon the appeal and often it is expedient and satisfactory to summarize the evidence and transmute it into narrative form. Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked." *Miller v. United States*, 317 U.S. 192, 198, 87 L.ed. 179, 183 (1942).

[25] *Griffin v. Illinois*, 351 U.S. 12, 14, n. 4, 100 L.ed. 891, 896 (1956).

[26] Ch. 126, Wash. Laws of 1913, presently R.C.W. 2.32.

48 P.(2d) 205 (1935), and cases cited; see *Mattocks v. Great Northern R. Co.*, 94 Wash. 44, 49-50, 162 Pac. 19, 21 (1916).

porter system and the record here reflects that, but for petitioner's lack of funds, there could have been available to him a stenographic transcript of the trial proceedings (R. 59; 63).

Whether or not an appeal could be technically perfected without the filing of a stenographic transcript of the trial proceedings was without significance in *Griffin*, and we think properly so. Whether or not modern reporting systems have led trial judges as well as counsel into an undesirable reliance upon reporters' transcripts, it certainly is the fact that resort to such transcripts has come to be nigh onto universal in appellate practice involving trial errors in the State of Washington irrespective of whether or not the statement of facts is certified in narrative form or in the form of the stenographic transcript itself.[27]

As recently stated, "Law addresses itself to actualities."[28] And it may be observed that "it does not face actuality to suggest" to petitioner that a narrative statement of facts (if he had been timely advised — which he was not) could serve as a substitute for the stenographic transcript of the trial proceedings itself.[28a]

The burden was upon the petitioner[29] to make and

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[27] See *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940), and cases cited note 22 hereinabove.

[28] Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, 23, 100 L.ed. 891, 901 (1956).

[28a] See Professor Francis A. Allen, Address, "*Griffin v. Illinois*: Its Antecedents and Implications," before the Conference of Chief Justices, July, 1957, proceedings of the Conference of Chief Justices; see also The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957) and compare *Chessman v. Teets*, 354 U.S. 156, 1 L.ed.(2d) 1253 (1957).

[29] It may also be noted that "a party proposing a statement of facts may

propose the statement of facts and to get it certified as containing "all the material facts, matters and proceedings heretofore occurring in the cause." *Livermore v. Northwest Airlines, Inc.*, 6 Wn.(2d) 1, 106 P.(2d) 578 (1940); *Nissen v. Chas. H. Lilly Co.*, 117 Wash. 470, 201 Pac. 743 (1921); *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859 (1911); *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738 (1905). It was required that the statement of facts must be served and filed "in good faith and with an intent that such statement is a full and complete record of the matters and proceedings occurring at the trial." *Colasurdo v. Colasurdo*, 27 Wn.(2d) 860, 869, 181 P.(2d) 172, 176 (1947). While the statement might have omitted immaterial matters without narrowing the scope of the appeal, *Palin v. General Construction Co.*, 45 Wn.(2d) 721, 277 P.(2d) 703 (1954), nonetheless, the proposed statement of facts must "purport to give the testimony of the witnesses, either by question and answer or in the narrative form," and could not be "a statement of the conclusions of counsel as to the force and effect of the testimony considered as a whole." *Morgan v. Chittenden Land Co.*, 92 Wash. 364, 159 Pac. 129 (1916).

The trial of petitioner lasted nine days (R. 60, 77, 18) and was attended by an official court reporter (R. 59, 63) whose notes if transcribed would have produced not less than several hundred typewritten pages. Upon giving notice of appeal on December 14, 1935 (R. 45), petitioner under Rule XVII, Rules of Practice, was

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not, designedly or through inadvertence, cast upon his opponent the burden of furnishing any considerable portion of a statement through proposed amendments." See *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252, 256, 48 P.(2d) 205, 207 (1935).

confronted with the necessity of preparing, serving and filing within sixty days (*i.e.*, by February 12, 1936) a certified statement of facts covering the complete[30] proceedings in the cause as well as an abstract of record and opening brief.

The record here discloses that two days after giving his notice of appeal, petitioner was incarcerated in the Washington State Penitentiary (R. 7, 84) and was, as well, without the benefit of counsel or the means to secure one (R. 59, 49, 55).

The record herein does not show that petitioner was advised that he could prepare a statement of facts by "do it yourself" methods. On the contrary, that possibility was not contemplated by anyone—judge, prosecutor or petitioner—as an equivalent for effective appellate review by petitioner. For a week or two after he was sentenced, petitioner apparently endeavored to get funds to pay for the prosecution of his appeal (R. 46). This effort failing, on December 30, 1935, he applied to the trial court for an order directing that a complete transcript of the trial proceedings be made up and furnished to him at public expense (R. 46-47, 49). The trial court set this application down for hearing on January 20, 1936, at which time it was denied (R. 50, 62-63). The application was vigorously opposed by the prosecuting attorney (R. 47-48, 58-59) who even went so far as to procure the erstwhile defense attorneys to join in his position (R. 60-61).

[30] The degree of completeness of a "complete" statement of facts of necessity must rest in the last analysis within the discretion of the trial court. See *State ex rel. Simcoe Sheep Co. v. Superior Court*, 2 Wn.(2d) 594, 98 P.(2d) 977 (1940). See also *State ex rel. Davies v. Superior Court*, 3 Wn.(2d) 102, 99 P.(2d) 934 (1940).

None of the affidavits or correspondence connected with this application suggested any alternative method of making an adequate statement of facts available. There was no offer to stipulate material facts. There was no offer to make the reporter's notes or anyone else's notes available in any form. On the contrary, the position of the prosecuting attorney was, as twice stated in so many words, that if the petitioner could not pay for his stenographic transcript of the trial proceedings, then "the matter of appeal is not a matter of right, but a pure matter of discretion of the court" (R. 48, 59).

The proposal of a complete statement of facts and compliance with the criminal appellate procedure of Wasnington in 1935 was a laborious and exacting task for a litigant under any circumstances (see Appendix A). In the circumstances confronting an indigent prisoner without benefit of counsel they became an impossibility unless a complete statement of facts covering the trial proceedings was furnished to him.[31]

That petitioner could not "be afforded as adequate appellate review as defendants who have money enough to buy transcripts"[32] unless a statement of facts or

[31] The penalty for his non-compliance with those procedural requirements was the dismissal of his appeal — a fate that befell many who sought their way through the labyrinth without the aid of those learned in the law. Rule XVI, Rules of the Supreme Court, 159 Wash. xlviii; 1 Rem. Rev. Stat. p. 149.

"The rule which requires the appellant in a criminal case to file a certified statement of facts or bill of exceptions with the clerk of this court within sixty days after appeal is taken is a salutary one, enacted to insure that punishment for crime shall not be too long delayed, and thus, in some degree, fail of its purpose. Our reports are replete with cases where it has been rigidly enforced." *State v. West*, 197 Wash. 595, 599, 86 P.(2d) 192, 194 (1939).

See also *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939).

[32] *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956).

transcript of the trial proceedings was furnished to him is, we submit, self-evident. In 1951, the Supreme Court of Washington itself recognized this when it provided in Rule 47, Rules on Appeal, 34-A Wn.(2d) 53:

> "Proposed statements of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county."

Whether or not such adequate appellate review can be afforded indigent defendants without the obligation of the state to provide them with effective counsel is perhaps a question which need not be here decided,[33] but it is clear we think on this record that there was no "equivalent" of a statement of facts or transcript of proceedings afforded to the petitioner and we believe that, without the benefit of counsel at least, there could be none.

3. As Applied, Rem. Rev. Stat. §42-5 Denied to Petitioner Equal Protection and Due Process

The crucial question reached by this petition is whether or not the requirement of *Griffin* that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts" is satisfied by the proviso in Washington's Official Court Reporter Act relating to typewritten manuscripts which in 1935 stated:

> "*Provided*, That when the defendant in any criminal cause shall present to the judge presiding

[33] See Point II of this Brief, below.

[33] *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L.ed. 891, 899 (1956).

> satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the . . . transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act."[35] [*I.e.*, by the county.]

Preliminarily it may be noted that this case does not reach two potential questions suggested in the concurring opinion in *Griffin*. First, although the trial of petitioner was a matter of twenty years' history at the time of this Court's decision in *Griffin*, there can be no contention that petitioner waived his constitutional rights recognized in the *Griffin* case. In both his Petition for Writ of Mandate (R. 69) and supporting affidavit (R. 66) before the Supreme Court of Washington in 1936 in Cause No. 26088, petitioner contended that the trial court's denial of his application for a "transcript of the evidence and an abstract of the record" in view of his lack of funds deprived him of "his constitutional rights." And even if this had not been so, in none of the four opinions in *Griffin* is there support for a contention that the constitutional rights and privileges of indigent defendants recognized by *Griffin*—incarcer-

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[35] Rem. Rev. Stat. §42-5, Ch. 126, §5, Wash. Laws of 1913; amended by Ch. 69, §5, Wash. Laws of 1943 and readopted as R.C.W. 2.32.240 which now reads:

"... *Provided*, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise that he is unable to pay for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript therefor shall be paid out of the county treasury as other expenses of the court are paid."

ated or otherwise — should be made to turn upon whether or not they made claim of a denial of constitutional rights and privileges at the time they may have been refused a transcript of proceedings at public expense prior to *Griffin*.[35a]

Second, no question is presented as to the steps which the State of Washington may take to protect itself against the waste and abuse of frivolous appeals. Neither the prosecuting attorney (R. 48, 58-59) nor the trial judge (R. 62-63) contended or considered that petitioner's appeal was frivolous or that it was not taken in good faith. The prosecutor asserted that "in his opinion no grave or prejudicial errors occurred" and "it is believed that Spokane County is not justified in incurring the expense of getting out a transcript in this case; that the matter of appeal is not a matter of right, but a pure matter of discretion" (R. 48, and see R. 59). And the trial court concluded that "justice would not be promoted by furnishing the defendant with a free Statement of Facts . . . in that defendant has been accorded a fair and impartial trial, and in the court's opinion no grave or prejudicial errors occurred therein" (R. 62-63).

This record contains no contention and no implication that petitioner's appeal was not prosecuted in good faith or that the errors claimed by petitioner and outlined above in paragraphs 10, 11 and 12 of the State-

[35a] Compare *Walker v. Johnston*, 312 U.S. 275, 85 L.ed. 830 (1941), and *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461 (1938); and see *United States v. Sanders*, 142 F.Supp. 638, 646 (D. Md. 1956).

See also Hon. Stanley E. Qua, Address: "*Griffin v. Illinois*," before the Conference of Chief Justices, July 10, 1957, proceedings of the Conference of Chief Justices.

ment of the Case were frivolous—errors, which if substantiated on appeal, would require a reversal of petitioner's judgment of conviction. Indeed, any such contention of frivolity would itself seem frivolous in the face of the affidavit of petitioner's appointed trial counsel which concluded with the statement "Subsequent to the rendering of the verdict this affiant and his associate have secured information that in their opinion if presented to the court, with proper time to complete the investigation would completely exonerate this defendant from the charge upon which he was tried" (R. 40). There is accordingly presented on this appeal no question as to a finding by the trial court that petitioner's appeal was not taken in good faith comparable to that presented in *Johnson v. United States*, 352 U.S. 565, 1 L.ed.(2d) 593 (1957) and *Farley v. United States*, 354 U.S. 521, 1 L.ed.(2d) 1529 (1957).

Rem. Rev. Stat. §42-5 is construed by the Washington Supreme Court to confer the broadest discretion upon the trial judge. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 465, 1 P.(2d) 331, 334 (1931) it is said:

> "The language of the statute is very broad and vests in the trial judge almost absolute discretion."

In *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 194 P.(2d) 374 (1948) the trial court had "expressed the conviction that Bird had been accorded a fair and impartial trial, in which no grave or prejudicial errors had occurred."[36] In refusing to mandamus the trial court to furnish relator with a free transcript of trial proceedings the court stated:

[36] 30 Wn.(2d) 785 at 787, 194 P.(2d) 374 at 375.

> ": . . . we are committed to the rule that the constitutional provision under which a person convicted of crime is given the right to appeal, does not include the right to require the county to defray the cost of a transcript on appeal in the case of an impecunious defendant. In *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 1 P.(2d) 331 (all of the authorities are reviewed therein), which has never been modified, we held that the statute (Rem. Comp. Stat., §42-5, now Rem. Supp. 1943, §42-5) which authorizes the trial judge, upon satisfactory proof of inability to pay, to order a transcript if, in his opinion, justice will thereby be promoted, vests the matter in the discretion of the trial judge. The only statutory authority pertaining to costs on appeal, so far as indigent defendants are concerned, will be found in Rem. Rev. Stat., §42-5, as amended by the Laws of 1943, chapter 69, p. 129, §4, which was interpreted by this court in *State ex rel. Marr v. Superior Court, supra* . . ."[37]

Concurring in an earlier opinion in connection with the same mandamus action, Judge Schwellenbach wrote:

> ". . . the legislature, in Rem. Supp. 1943, §42-5, placed the initial responsibility for determining whether or not a transcript shall be furnished an accused at the expense of a county, upon the judge of the county where the application is made, and that judge should feel perfectly free to exercise his discretion in determining whether or not 'justice will thereby be promoted'."[38]

See also *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 809, 314 P.(2d) 930, 932 (1957); *State v. Perkins*, 32 Wn.(2d) 810, 866, 204 P.(2d) 207, 239 (1949).

[37] 30 Wn.(2d) 785 at 788, 194 P.(2d) 374 at 376.

[38] *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 110, 120, 190 P.(2d) 762, 767 (1948).

Under this statute the issue to be resolved by the trial judge is *not* whether the appeal is prosecuted in good faith.[39] Rather is the trial judge authorized to order a free transcript "if in his opinion justice will thereby be promoted."

Under this statute the denial of a transcript at public expense involves a determination of no less than the merits of the attempted appeal. In short, the trial judge is forced to conclude that he committed error at the trial if he grants a free transcript since the function of the appellate court is to correct errors of the trial court and one could hardly be expected to conclude that justice would be promoted by an appeal unless errors of the trial court were to be corrected. The circle may be completed by suggesting that if the trial court is of the opinion that justice will be promoted by an appeal (ostensibly to correct errors of the trial court) then he should grant a new trial so that the circle might start all over again.

There is something inherently distasteful as well as illogical in a process which makes a man the judge of his own errors[40] and one does not need to be learned in

[39] Compare *Johnson v. United States*, 352 U.S. 565, 1 L.ed.(2d) 593 (1957); and *Farley v. United States*, 354 U.S. 521, 1 L.ed.(2d) 1529 (1957), where this Court had for review the question as to the proper assistance to be afforded an indigent defendant seeking to review the trial court's determination that his appeal was "not taken in good faith" within the meaning of 62 Stat. 954, 28 U.S.C. §1915, authorizing the prosecution of appeals *in forma pauperis*.

[40] In appellate proceedings at common law, the trial judge is an additional defendant in error or respondent in every case, whether so named or not. In the earliest such proceedings, the royal courts of England apparently summoned the trial judges to defend their judgments in person or by champion. 2 Pollock & Maitland, History of English Law Before the Time of Edward I (2d ed. 1911) 666-669.

the law to recognize that readily admitting to one's errors is not one of the more pronounced characteristics of humankind (See R. 8).

In words which might well have been written in support of this petition,[4] Judge Steinert, dissenting in *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 792, 793, 194 P.(2d) 374, 378 (1948), pointed up the impossibility of reviewing this ruling of the trial court on its own merits as follows:

> "Now, whether the trial court in refusing defendant's request with respect to a transcript of the testimony and other proceedings abused its discretion, is a question which we as a reviewing court cannot possibly decide unless in some way there is brought to us the record upon which the trial court based its decision. . . ."
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> * * *
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> "It may well be that, as stated by Judge Rosellini, 'justice would not be promoted by furnishing petitioner Bird with a free statement of facts,' and

[4] See also the dissenting opinion of Chief Judge Tolman in *State ex rel. Marr v. Superior Court*, 163 Wash. 459, 466, 1 P.(2d) 331, 334 (1931), where he wrote:

"... But when the trial court goes beyond that and says, as he said here, that the applicant has been accorded a fair and impartial trial, and that no grave or prejudicial errors have occurred therein, then he thereby usurps the functions of this court and himself assumes to pass as a court of review upon his own rulings, and thus denies the constitutional right to appeal."

Even now, trial judges in many jurisdictions are personally answerable to writs of mandamus and prohibition; and in the normal course of appellate proceedings a trial judge must answer in the sense that he must customarily certify to the proceedings which have occurred before him. This was what was commanded by the writ of error, which was addressed to the trial judge. Tidd's Practice, *1141-1143; Stephen on Pleading, *128-134. Most rules of common law appellate procedure presume that such procedure is intended primarily to correct the errors of the trial judge and only incidentally to do justice between the parties.

that 'Bird had been accorded a fair and impartial trial.' But those are the very questions which we will be required to decide upon, or in connection with, the appeal when the record is brought to us. Whether or not a convicted defendant has had a fair and impartial trial, is of the very essence of every criminal appeal; and whether or not justice would be promoted in a given instance, is likewise a question within the province of this court, as a reviewing tribunal, to determine in connection with the appeal.

"'. . . And of what value to anyone is a constitutional right of appeal if the questions to be determined on such appeal are dependent upon a record which, though capable of being supplied, cannot be produced or obtained by the defendant because he is destitute? It is apparent that in this case the appeal will be futile without the record upon which the appeal is founded.'"[42]

Also to be noted with interest is the dissenting opinion of Judge Frank in *United States v. Johnson,* 238 F.(2d) 565, 568, 569 (CA-2, 1956) where he wrote:

". . . But a trial judge, in all honesty, may believe the trial free of error. In the instant case the trial judge stated, 'The jury was adequately and prop-

[42] The conclusion of Judge Steinert that:

"I am of the opinion that in a *capital case*, where the defendant is an indigent person, unable to pay for the transcript of the testimony and other proceedings in the case, it is an abuse of discretion to refuse to have such transcript supplied to him at the expense of the county, for otherwise the constitutional right of appeal is worthless." 30 Wn. (2d) 785, 793, 194 P.(2d) 374, 378.

undoubtedly contributed to the formulation of the following provision in Rule 47, Rules on Appeal, 34-A Wn.(2d) 53 (effective January 2, 1951):

"Proposed statement of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county."

erly instructed as to the law'; but experience teaches that not too infrequently a trial judge mistakenly entertains such a view of his instructions to the jury."

* * *

"But how can the existence of such a meritorious appeal be shown unless the defendant has access to a transcript of the events at the trial?"

The recent dictum of the Supreme Court of Washington in *In re Grady v. Schneckloth*, 150 Wash. Dec. 806, 812, 314 P.(2d) 930, 934 (1957) implying that existing Washington procedure "satisfies every requirement" of the *Griffin* case does not appear to be in accord with the thinking of the Superior Court judges of the state who have been confronted with the problems of applying *Griffin*. A Special Committee of the Superior Court Judges' Association of the State of Washington has concluded that "*Griffin v. Illinois* does make a substantial change in Washington law, however, with respect to non-capital cases *in forma pauperis* in which there is a bona fide claim of reversible error and a showing that such record is necessary for appellate review; in such cases, the trial judge no longer has discretion to refuse an adequate record. And this is true, even though the state may deny that there was error or that it was prejudicial."[43]

As indicated above this case does not reach the question as to what may be an effective equivalent to a ste-

[43] Report of Special Committee Appointed to Study *Griffin v. Illinois*, Superior Court Judges' Association of the State of Washington; see Appendix B wherein this report is set forth in full. Compare, The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

nographer's transcript of the trial proceedings for purposes of affording adequate and effective appellate review to indigent defendants in Washington. There was none for this petitioner. Nor does this case reach the question as to the proper procedure which may be employed by the courts in Washington to determine what if anything less than a total transcript of proceedings may be sufficient to insure adequate review. The Report of the Special Committee of the Superior Court Judges' Association of the State of Washington, above referred to, suggests possible solutions and considerations with respect to applying the rule of *Griffin* to present Washington criminal appellate procedures. Whatever may be appropriate answers to such questions,[44] it is submitted that the *Griffin* rule requires a reversal of the judgment of the Washington Supreme Court below with the direction that a reporter's transcript or statement of facts covering the trial proceedings be furnished to petitioner and that he be permitted to perfect his appeal under existing rules and procedures upon the furnishing of such statement of facts.

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[44] Compare Illinois Supreme Court Rule 65-1, S.H.A. Ch. 110, §101.65-1 referred to in *People v. Griffin*, 9 Ill.(2d) 164, 137 N.E.(2d) 485, 486 (1956), and *In re Patterson's Petition*, ... Colo. ....., 317 P.(2d) 1041, 1042 (1957), with *State v. Moore*, ... N.D. ....., 82 N.W.(2d) 217 (1957). See also, The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

II. PETITIONER WAS NOT FURNISHED WITH COUNSEL ON APPEAL

1. The Failure of Washington to Furnish Petitioner with Counsel on Appeal Denied Him Equal Protection and Due Process

While it may well be that the Fourteenth Amendment does not impose the obligation upon the states to appoint counsel for indigent defendants in all criminal cases,[45] the implications of *Griffin* would certainly indicate that the appointment of counsel to aid indigent appellants on criminal appeals is indispensable to affording them "as adequate appellate review as defendants who have money enough to buy transcripts."[46]

[45] See *Betts v. Brady*, 316 U.S. 455, 86 L.ed. 1595 (1942), and compare *Powell v. Alabama*, 287 U.S. 45, 77 L.ed. 158 (1932).

[46] See *Schaefer* "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 10 (1956):

" . . . The analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer. Since indigence is constitutionally an irrelevance, it would seem that a successful argument might be based upon the proposition that the defendant by reason of his poverty is deprived of a right available to those who can afford to exercise it."

And see Annotation, "Right of indigent defendant in criminal case to aid of state as regards new trial or appeal," 55 A.L.R.(2d) 1072, 1085:

" . . . But this comment may be made: the essence of the Supreme Court's ruling in the *Griffin* case is that a person convicted of crime cannot be put at a substantial disadvantage with respect to appellate review of his conviction merely because he is poor. Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear *pro se* before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the *Griffin* doctrine."

See also The Council of State Governments: "The Effects of *Griffin v. Illinois* on the States' Administration of the Criminal Law" (May, 1957).

This was obviously the conclusion of Judge Frank, dissenting in *United States v. Johnson*, 238 F.(2d) 565, 570-571 (CA-2, 1956)[47] wherein he stated:

> "... In order, however, adequately to procure such a statement [of facts], and also adequately to point out in a petition to the upper court that (if it be a fact) the judge's certificate [that the appeal was not taken in good faith] was mistaken, the ordinary indigent defendant will need the assistance of counsel. Without such lawyer-assistance, such a defendant will be at a marked disadvantage as compared with a non-indigent defendant. Accordingly, I think the *Griffin* doctrine requires that an indigent defendant have such legal assistance; ..."

Certainly it "does not face actuality"[48] to review the labyrinth of criminal appellate procedure confronting this petitioner and conclude that he was not at a substantial disadvantage by virtue of the fact that he was not represented by counsel.

The Washington cases cited in argument above furnish eloquent testimony of the pitfalls encountered by others who have attempted to tread the appellate path unaided by those trained in the law.[49]

As set forth above in paragraph 13 of the Statement of the Case, petitioner here points out that he was "not trained in legal proceedings or in the language of the law" and he has contended that "the accused in crimi-

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[47] Reversed sub nomine *Johnson v. United States*, 352 U.S. 565, 1 L.ed. (2d) 593 (1957).

[48] Mr. Justice Frankfurter, concurring in *Griffin v. Illinois*, 351 U.S. 12, 23, 100 L.ed. 891, 901 (1956).

[49] See *State v. Currie*, 200 Wash. 699, 94 P.(2d) 754 (1939); *State v. West*, 197 Wash. 595, 86 P.(2d) 192 (1939).

nal prosecutions shall have the right to counsel" (R. 9). Petitioner was represented by appointed counsel upon trial and "up to and including the argument for a new trial and motion to arrest judgment" (R. 26). For reasons neither material nor disclosed by the record, petitioner's appointed counsel thereafter withdrew from the case—apparently with the consent of the trial court.[50] In any event, from the time of giving his notice of appeal, petitioner was unrepresented by counsel, and certain it is that he was confronted with an "undertaking which was far beyond his capacity and understanding."[51]

The record does not reflect that petitioner made request of the trial court for the appointment of other counsel[52] to aid him in perfecting his appeal,[53] but even

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[50] See R. 77. The inconsistency of appointed counsel's affidavit in support of a motion for continuance of hearing the motion for new trial on behalf of petitioner (R. 39-40) with his affidavit in support of the state's motion resisting application for a transcript at county expense (R. 60-61), occasioned even the respondent in the court below to question "whether or not it was a violation of the attorney-client relationship and improper for the court to consider" this latter affidavit (R. 29).

[51] *State v. Currie*, 200 Wash. 699, 700, 94 P.(2d) 754, 755 (1939).

[52] Petitioner's affidavit in support of Motion for a Writ of Mandate indicates that he intended to prosecute his appeal on his own behalf (R. 67).

[53] See *Garrison v. Johnston*, 104 F.(2d) 128, 130 (CA-9, 1939), where it is observed,

"While it has been said that an accused 'requires the guiding hand of counsel at every step in the proceedings against him' (*Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 84 A.L.R. 527; *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.ed. 1461), it is not clear as to when counsel appointed for trial is relieved of his duty to proceed further. It may be that counsel appointed to represent an accused for trial is relieved of any duty to proceed further upon judgment of the trial court; and that the accused, after conviction, should request either the trial court or the appellate court to appoint counsel for the appeal."

had he done so the decisions of the State of Washington indicate that such request would have been unavailing since there was no statute authorizing such an appointment.[54] It is submitted, however, that if adequate and effective appellate review entails benefit of counsel as well as benefit of a transcript of proceedings—as we think it must—the circumstances of this record required the courts below to provide the assistance of appellate counsel for this petitioner.[55]

Irrespective of whether or not this Court sees fit to equate the Sixth and Fourteenth Amendments in terms of an indigent defendant's constitutional right to the benefit of counsel on appeal,[56] the criminal appellate procedures of the State of Washington available to this petitioner in 1935 without the benefit of counsel as outlined above were such as to render his right to appeal completely illusory. Whether or not the failure, if not refusal, to furnish him the benefit of counsel on appeal without more, would have resulted in the denial of constitutional rights is a question which perhaps need not be here decided. It is submitted, however, that any re-

[54] See *State v. West*, 197 Wash. 595, 597, 86 P.(2d) 192, 193 (1939); see also *State ex rel. Bird v. Superior Court*, 30 Wn.(2d) 785, 789, 194 P.(2d) 374, 376 (1948), quoted above at note 9.

[55] Nor do we believe that it can be contended that any failure of petitioner to claim the right to counsel on appeal amounted to a conscious waiver of his constitutional rights. At a time when any such claim would have been unavailing under the law of Washington and at a time when this Court had not yet declared the extent of such constitutional right, it is believed that "candor compels acknowledgment" that petitioner "was justified in assuming that such a restriction upon criminal appeals in . . . [Washington] was presumably a valid exercise of the State's power at the time when he suffered its consequences." See Frankfurter, J., concurring in *Griffin v. Illinois*, 351 U.S. 12, 25, 100 L.ed. 891, 902 (1956).

[56] Compare *Johnson v. Zerbst*, 304 U.S. 458, 82 L.ed. 1461 (1938).

mand of this cause to the courts of the State of Washington for further proceedings must include an assurance to this petitioner of the benefit of counsel in those proceedings.

H. CONCLUSION

Petitioner requests in view of the foregoing that the judgment of the Supreme Court of the State of Washington denying his application for a writ of habeas corpus in Cause No. 33928 be vacated and that this cause be remanded to that court for further proceedings subject to the following conditions:

(1) that the judgment of the Supreme Court of the State of Washington in Cause No. 26179 dismissing petitioner's appeal from the judgment of conviction in Cause No. 11114 of the Superior Court of the State of Washington in and for Spokane County be vacated;

(2) that petitioner be furnished a statement of facts or stenographic transcript covering the trial proceedings in said Cause No. 11114;

(3) that petitioner, upon being furnished such statement or transcript, be permitted to perfect his appeal from the judgment in Cause No. 11114 of the Superior Court of the State of Washington in and for Spokane County in accordance with current rules and procedures of the Supreme Court of the State of Washington;

(4) that petitioner be furnished counsel without expense to him to assist him in the prosecution of his appeal; and

(5) such other conditions as may be necessary to insure to petitioner adequate and effective ap-

pellate review of the judgment of the trial court consistent with the obligations of the State of Washington to afford petitioner equal protection of the laws and due process under the provisions of the Constitution of the United States.

Respectfully submitted,

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APPENDIX A

TEXT OF WASHINGTON STATUTES* AND COURT RULES CITED IN PART C OF BRIEF OF PETITIONER

CONSTITUTION OF THE STATE OF WASHINGTON

Art. I, §22, as Amended by Amendment 10

"RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be crim nal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed [Wash. Laws 1921, p. 79, §1. Approved November 1922]."

STATUTES*

Wash. Laws 1893, Ch. 61, §4, as amended by Wash. Laws 1901, Ch. 31, §2; Rem. Rev. Stat. §1729:

Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the Superior

*Text of statutes taken from the official session laws of Washington rather than from Remington's Revised Statutes.

Court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted *in forma pauperis*, and in such cases at the expense of the county), a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the Superior Court shall, at the expense of appellant, send up to the Supreme Court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the Superior Court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much th reof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the Supreme Court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the

same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the Supreme Court and the same shall be transmitted accordingly, and shall be under the control of the Supreme Court.

Wash. Laws 1913, Ch. 116, §§1, 2, as amended by Wash. Laws 1915 Ch. 104; Rem. Rev. Stat. §§1730-1, 1730-2:

SECTION 1. That that certain act entitled "An act relating to appeals to the supreme court of the State of Washington and amending section 1718 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 19, 1913, be amended to read as follows:

SECTION 1. That the appellant shall, at or before the time when he is required by rule or statute to serve his opening brief, cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error: *Provided*, That in all cases in which no testimony is sent up with the record, or in which the statement of facts does not exceed one hundred (100) pages of double space, typewritten evidence, no abstract of record shall be required. Said abstract, in so far as it sets out testimony, shall be condensed into narrative form, without the questions and answers except when necessary for the discussion of evidence. It shall be prepared without notice or hearing thereon, and if the opposite party be not satisfied with it, he may cause to be typewritten and served, without notice, either before or at the time of serving his answering brief, so much of the record and statement of facts, condensed as above, as he for his part may deem proper for the correction or supplementing of his opponent's abstract. Each party shall pay the cost of typewriting his abstract, and the prevailing party shall be entitled to recover

his disbursements therefor as other costs. For any abuse in typewriting excessive or unnecessary matter in the abstract, the supreme court, without regard to which party may prevail, may impose the costs thereof upon the party committing such abuse. The supreme court shall also provide by rule the form of abstracts, the number thereof to be typewritten, and for other particulars thereof, including the time and place of filing the same.

SEC. 2. Nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions, and such statements and bills shall be transmitted to the supreme court to be referred to in any controversy concerning the accuracy of the abstracts, as well as for reference to exhibits, and for such other uses as the supreme court may find proper in consideration of all matters on appeal.

Wash. Laws 1893, Ch. 60, §§7, 8, 9, 11; Rem. Rev. Stat. §§387, 388, 389, 391:

SEC. 7. Alleged error in any order, ruling or decision to which it is provided in this act that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this act, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made, or in which he has joined, from any other appealable order or from the final judgment in the cause, where such error, if found to exist, would materially affect the correctness of the judgment or order appealed from: *Provided*, The ruling or decision, the alleged error in which is sought to be so reviewed, together with the exception thereto, if any, was a matter of record in the cause in the first instance, or before the hearing of the appeal has been brought into the record in the manner prescribed in this act. And any such alleged error shall also be considered in

the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. But no exception to any appealable order or to any final judgment shall be necessary or proper in order to secure a review of such order or judgment upon direct appeal therefrom.

SEC. 8. Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the record in the cause, by the certifying of a bill of exceptions as in this act provided. And any such party may, after the making of an appealable order or the final judgment in the cause, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record in the cause by the certifying of a statement of facts, as in this act provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause.

SEC. 9. A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and excepted, the bill or statements as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments.

SEC. 11. The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein. The certificate shall be signed by the judge, but need not

be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuses to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto.

Wash. Laws 1913, Ch. 126, §5; Rem. Rev. Stat. §42-5:

SEC. 5. When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into long hand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: *Provided*, That when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript, the presiding judge, if in his opinion justice will

thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section three of this act.

COURT RULES

RULES OF THE SUPREME COURT (effective April 1, 1931):

Rule III, 1 Rem. Rev. Stat. p. 138, 159 Wash. xxxiii:

RULE III

TRANSCRIPT AND STATEMENT OF FACTS

1. Transcripts may be printed or typewritten. If typewritten, the paper shall be of good quality of the size of legal cap, and only a black record ribbon shall be use. If printed, there shall be a compliance with the rule with reference to printed briefs as to size, spacing and print. The transcript shall be free from interlineations and erasures, and shall be paged and prefixed with an alphabetical index of its contents, specifying the page of each separate paper, order or proceeding.

2. Every statement of facts shall comply in form with the rule with reference to transcripts. The index thereto shall specify the page on which the testimony of each witness commences, the page at which exhibits are introduced, the page on which motions made during the course of the trial are recorded, and the page of the ruling of the court thereon.

3. All exhibits shall be lettered or numbered in consecutive order, and, where practicable, shall be attached to the statement of facts. Each exhibit shall be identified by endorsing on the face thereof, in a conspicuous place, its letter or number, an abbreviated title of the cause, and the superior court number of the cause. Where, from the nature of the exhibit, it is not practicable to make such an indorsement, the exhibit may be identified by a tag, securely fastened thereto, on which is written or printed its letter or number, the title of the cause, and its superior court number.

4. In all cases where the judge of the superior court has filed a written memorandum giving his reasons for his decision, the same shall be included as a part of the statement of facts.

Rule VI, 1 Rem. Rev. Stat. p. 139, 159 Wash. xxxv:

RULE VI

ABSTRACTS

In every case in which the statement of facts contains over 100 pages, an original and two legible copies of a typewritten abstract of the record shall be filed with the clerk of this court, along with the briefs of the party preparing the same. The typewritten abstract shall be in the same form as the transcript in the cause, shall be indexed, and shall contain appropriate references by pages to the transcript or statement of facts. Printed abstracts, bound separately from the printed briefs, but of the same size, type and form as the printed briefs, will be given the same effect by the court as typewritten abstracts. The abstract shall be substantially in the following form:

(The form outline suggested covers only a trial by jury in a civil action. In causes tried by the court, in criminal causes, and all special proceedings, the same general outline should be followed. In all cases, follow the events of the trial in their chronological order. Do not omit the appropriate captions or headings. Use the abbreviations Tr. for transcript; St. for statement of facts; p. for page. Append to the abstract in all instances appropriate references to the transcript or statement of facts, showing the page on which the matter abstracted will be found. Do not in any instance abstract more of the proceeding than is necessary to show the error involved. The cardinal rule to be observed is, present everything necessary to an understanding of the questions raised on the appeal in a brief and concise manner, and omit everything else.)

(On the cover).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE,

Appellant (Or Respondent),

v.

RICHARD ROE,

Respondent (Or Appellant).

APPELLANT'S ABSTRACT OF RECORD

Appeal from the judgment of the superior court of .....County. Hon.....Judge.

A. B. & C. D.

Attorneys for Appellant.

(Address)

E. F. & G. H.

Attorneys for Respondent.

(Address)

(On the second page)

INDEX

(Here insert a complete index to each separate matter contained in the abstract, showing the page of the abstract on which it is found.)

(On the third and succeeding pages)

Complaint

On the.....day of....., 19....., the plaintiff served upon the defendant a complaint stating his cause of action as follows:

(Set out all of the complaint necessary to show the nature of the action and to an understanding of the questions presented on the appeal, and no more. Omit all formal parts, unless error is based thereon. In setting out exhibits attached to the complaint, omit all formal or irrelevant parts. Usually a general description of the exhibit will be sufficient.)

Summons

The summons and the return thereon are as follows:

(Insert so much of summons and return as may be necessary to show the error based thereon. If no error is claimed with reference to either the summons or return, omit any reference thereto.)

Motions

On the.....day of....., 19....., the defendant appeared generally (or specially) in the action and moved to quash the service (or to make the complaint more definite and certain, etc.), basing his motion on the following grounds:

(Here state the grounds of the motion.)

Thereafter, and on the.....day of....., 19....., the same was submitted to the court and the following ruling was made thereon:

(Set out the ruling of the court, giving only the substance unless the entire entry is necessary to show the error claimed. If no error is predicated on the motion, omit all reference thereto.)

Demurrer

On the.....day of....., 19....., the defendant demurred to the complaint on the following grounds:

(Set out only the ground of demurrer on which the error is predicated.)

On the.....day of....., 19....., the same was submitted to the court and the following ruling made thereon:

(Set out the substance of the journal entry containing the ruling. Omit all formal parts unless necessary to show the error claimed. If no error is based on the ruling on the demurrer, omit any reference thereto.)

Answer

On the.....day of....., 19....., the defendant answered the complaint as follows:

(Set out so much of the answer as may be necessary to make clear the issues and present the questions raised on the appeal. If affirmative defenses are pleaded, set out only the substance of them, unless a literal copy is necessary to show the error claimed. If motions or demurrers were made to the answer, and error is predicated on the rulings made thereon, set out the same under the caption, "MOTION TO ANSWER," "DEMURRER TO ANSWER," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

Reply

On the.....day of....., 19....., the plaintiffs replied to the answer as follows:

(Here set out the substance of the reply. If motions or demurrers were directed against the reply, and error is based on the rulings thereon, set out the same under the caption, "MOTION TO REPLY," "DEMURRER TO REPLY," as the case may be, following the form suggested for motions and demurrers directed against the complaint.)

Trial—Examination of the Jury

On the.....day of....., 19....., the cause was tried by a jury wherein the following proceedings were had:

JOHN STYLES, being called and duly sworn to make true answers touching his qualifications to sit as a juror, answered the interrogatories propounded to him as follows:

(Set out his answers in narrative form, unless the questions propounded are necessary to an understanding of the objections made to his qualifications. If no question is made on the appeal as to the qualification of any juror, omit all reference to the method by which the jury was impaneled; state simply that a jury was impaneled and sworn.)

Statement of Counsel

After which, A. B., of the attorneys for the plaintiff, made the following statement to the jury:

(Set out the statement if necessary to an understanding of any question raised on the appeal. If not, omit all reference to the statement. Proceed in the same manner through all of the preliminary proceedings had prior to the commencement of the introduction of testimony, in so far as the same is necessary to an understanding of some question raised on the appeal.)

Evidence

TITUS OATES, called and sworn as a witness on behalf of the plaintiff, testified as follows:

(Set out his testimony in narrative, unless the question and answer is necessary to an understanding of the error claimed. If the witness identifies an exhibit, and the exhibit is introduced in evidence, insert a description of the same. Let the witness speak in the first person. Make appropriate references to the abstract or the statement as the case may be: e.g., Ab. 57; St. 140. One reference at least shall be made to each separate page abstracted.)

On CROSS-EXAMINATION, he further testified as follows:

(Set out his cross-examination, following the form suggested for his direct testimony.)

On RE-DIRECT EXAMINATION, he further testified as follows:

(Set out the same as above directed. Continue in the same manner with respect to each witness sworn on behalf of the plaintiff. In all cases abstract only so much of the evidence as may be necessary to show the error involved; it is necessary to abstract the evidence in full only in those cases where the entire evidence is required to show the error.)

Motion for a Nonsuit

The plaintiff having rested, the defendant moved for a nonsuit (or a directed verdict, challenged the legal sufficiency of the evidence, as the case may be), on the grounds that (state the grounds of the motion). The court overruled (or sustained) the motion, stating the reason for the ruling as follows:

(Set out the reasons given.)

Defendant's Evidence

WILLIAM DUDLEY, called and sworn as a witness on behalf of the defendant, testified as follows:

(Set out his testimony in the manner given for abstracting the evidence of the plaintiff's witnesses.)

Plaintiff's Rebuttal Evidence

The defendant having rested, the plaintiff introduced the following testimony in rebuttal:

(Abstract the evidence in the manner given for abstracting evidence of the plaintiff's witnesses in chief. If the defendant offers evidence in rebuttal of that offered by the plaintiff, set the same forth with the caption, "DEFENDANT'S REBUTTAL EVIDENCE.")

Requested Instructions

At the conclusion of the evidence, the plaintiff (or defendant, as the case may be) requested the court to give the jury the following instructions:

(Set forth the instructions requested and refused on which the claim of error is predicated. Show in the appropriate place the exceptions taken to the refusal to give each requested instruction.)

Instructions Given by the Court

The court instructed the jury orally (or in writing, as the case may be) as follows:

(Set out the substance of each instruction given, and the instructions in full to which exceptions are taken and on which error is predicated. Show in the appropriate place the exceptions taken to the instructions.)

Argument

The cause was argued to the jury by the attorneys for the plaintiff and defendant, during which A. B., of the attorneys for the plaintiff (or defendant, as the case may be), used the following language:

(Set out the argument to which objection is made.)

To the argument of the attorney the opposing attorney objected for the reason (set out the reason). The court ruled thereon as follows: (Set out the ruling.)

(If no error is predicated on the argument of counsel, omit any reference to it.)

Verdict

The jury retired to consider of their verdict, and thereafter, on the.....day of....., 19....., returned the same into court as follows:

(Set out the body of the verdict, omitting all formal parts.)

Motion for a New Trial

On the.....day of....., 19....., plaintiff moved for a new trial (in arrest of judgment, for a judgment *non*

obstante veredicto, as the case may be), basing his motion upon the following grounds: (Set out the substance of the motion.) The court granted (or denied) the same on the .....day of....., 19....., on the following grounds:

(If the motion is granted or denied and a claim of error is made thereon on the appeal, set out sufficient of the entry to show the claim of error.)

Judgment

Upon the return of the verdict, judgment thereon was entered as follows:

(Set out sufficient to show the nature of the judgment entered. If error is predicated thereon, set forth all that is necessary to show the error. Omit all formal parts.)

Appeal

On the.....day of....., 19....., the plaintiff (or defendant) appealed from the judgment by giving notice in open court (or by serving a written notice), and on the .....day of....., 19....., filed his bond on appeal, conditioned as a cost bond (or cost and supersedeas bond, as the case may be). The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the .....day of....., 19.....; the statement of facts was filed on the.....day of....., 19.....; and served on the.....day of....., 19.....; amendments to the statement of facts were proposed by the respondent on the .....day of....., 19.....; and the statement was settled and certified by the trial judge on the.....day of .....day of....., 19.....

.....

Attorneys for Appellant.

Rule VIII, 1 Rem. Rev. Stat. p. 146, 159 Wash. xliii:

RULE VIII

CONTENTS AND STYLE OF BRIEFS

1. Briefs shall be printed throughout in plain, clear type, not smaller in size than eleven point, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages

of the abstract for verification in all instances where an abstract is required. In other instances, the reference shall be to the original record.

2. Each error relied on shall be clearly pointed out and separately discussed under appropriate designated headings. Where there are several assignments presenting the same general questions, they may be discussed together. Where an objection is based on an instruction of the court, the instruction shall be set forth in the brief in full.

3. In citing authorities, the title of the case and the page of the volume on which it is reported must be clearly set out in each place in the brief where the case is mentioned; and in citing text books, the edition must be specified.

4. Briefs must be of the following dimensions: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive, of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The cover shall either be gray, or some other color that will readily show the print. The title of the case, the designation, Appeal from the Superior Court of.....County, ...Judge, Brief of Appellant (or Brief of Respondent, Appellant's Reply Brief, as the case may be), and the names of the attorneys appearing on the side upon which the brief is filed, with their respective addresses, shall be printed on the front cover.

5. Twenty-five copies of all printed briefs shall be filed with the clerk.

6. Any party, after filing briefs, may submit additional authorities, not less than one day prior to the hearing of the appeal. The authorities so submitted shall be typewritten or printed, and six copies thereof shall be filed with the clerk of this court, and not less than one copy served upon the adverse party.

Rule XVI, 1 Rem. Rev. Stat. p. 149, 159 Wash. xlviii:

RULE XVI

FAILURE TO FILE BRIEFS

If the appellant fails to file a brief, an affirmance will be directed. If the respondent files no brief, the cause will be deemed submitted upon its merits as to him. A respondent who has not filed a brief shall not be permitted to argue the cause orally without permission of the court.

RULES OF PLEADING, PROCEDURE AND PRACTICE (effective April 1, 1931):

Rule VII, 2 Rem. Rev. Stat. §308-7, 159 Wash. lxi:

RULE VII

TIME FOR FILING STATEMENT OF FACTS

1. A proposed bill of exceptions or statement of facts must be served and filed either before or within ninety days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be) from an order with a view to an appeal from which the bill or statement is proposed. And the certifying of a bill of exceptions or statement of facts provided for by Chapter VII of Remington's Compiled Statutes (Pierce's Code, §§7810-7826), and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause; and no irregularity or failure to pursue the steps prescribed by this rule on the part of any party or the judge shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts.

Rule X, 2 Rem. Rev. Stat. §308-10, 159 Wash. lxiv:

RULE X

APPELLATE PROCEDURE

1. In civil actions and proceedings an appeal from any

final judgment must be taken within thirty days after the day of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other causes within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within thirty days after the entry of final judgment.

2. Within thirty days after an appeal shall have been taken by notice, as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted *in forma pauperis*, and in such cases at the expense of the county) a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within three months after said appeal shall have been taken by notice, as aforesaid, the clerk of the superior court shall, at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up, together with any thereafter sent up, as herein below provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof, may be

prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify, and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the supreme court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the supreme court and the same shall be transmitted accordingly, and shall be under the control of the supreme court.

3. Within ninety (90) days after an appeal shall have been taken by notice, as provided herein, the appellant shall serve on the respondent three copies, and shall file with the clerk of the superior court twenty-five copies, together with proof or written admission of service, as aforesaid, of a printed brief on the appeal upon his part, which brief shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects, and its form and size, as the supreme court by its rules may have prescribed. Within thirty days after the service of the appellant's brief, the respondent shall likewise serve and file with the clerk of the superior court, with like proof of service, the like number of copies of a printed brief on the appeal upon his part, which shall likewise conform to the rules of the supreme court. Not less than ten days prior to the hearing, the appellant may also serve and file, either with the clerk of the superior court or in the supreme court, like printed brief or briefs, strictly in reply to re-

spondent's brief. The time for service and filing of briefs, as in this section prescribed, may be extended by order of the superior court for good cause shown, or by stipulation of the parties concerned. Either party may, after the filing of his briefs, and not less than one day prior to the hearing of the appeal, submit to the supreme court and to the adverse party a written or printed statement of any additional authorities, with suitable comment thereon strictly in support of the position taken in his brief hereinabove required to be filed. But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities, or on the hearing, any grounds for reversal not clearly pointed out in his original brief.

Rule XVII (effective March 1, 1935), 178 Wash. xxxvii:

RULE XVII

APPELLATE PROCEDURE IN CRIMINAL CASES

1. In criminal cases, in order to initiate an appeal, notice of such appeal to the supreme court shall be given in open court at the time of, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry of, judgment or order from which the appeal is taken.

2. No appeal in a criminal case shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:

(a) A statement of fact or bill of exceptions served on the respondent and certified by the judge of the court below according to the procedure, so near as may be, in civil cases;

(b) A transcript of record certified by the clerk of the court below, pursuant to the procedure, so near as may be, in civil cases;

(c) Appellant's abstract of record where required by the

rules of the supreme court, with proof of service thereof on the respondent;

(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.

Except as herein otherwise provided, the giving of the notice of appeal, the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record and appellant's opening brief shall be jurisdictional.

In any case where the proposed statement of facts or bill of exceptions has been filed with the clerk of the court below within sixty days after giving notice of appeal as herebefore provided, but the appellant, through no fault of his own, is unable to have the same certified in time to file the same with the clerk of the supreme court within the time herein specified, the time for such certification may, upon good cause shown, be extended by the Chief Justice of the supreme court, or, in his absence, any other judge thereof; and if such extension be granted, said Chief Justice of the supreme court or judge thereof, shall, in the same order, fix the time for filing the appellant's opening brief and abstract of record.

The appellant shall, prior to the date fixed by the clerk of the supreme court for the hearing of the appeal pursuant to the rules of the supreme court, file in the supreme court the statement of facts or bill of exceptions certified by the judge of the court below pursuant to the procedure, so near as may be, in civil cases. If not so filed, the statement of facts or bill of exceptions shall not be considered; and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information.

Whenever an appeal shall be properly filed in the supreme court in accordance with this rule, the clerk of the supreme court shall immediately send a written notice thereof to the clerk of the court below to be filed as part of the record in the

court below, and shall simultaneously send a copy of said notice to the prosecuting attorney of the county from which the appeal was taken.

3. The respondent shall, within thirty days after the service by the appellant of his opening brief, file his answering brief with the clerk of the supreme court. Not less than two days prior to the hearing, the appellant may also serve and file with the clerk of the supreme court a reply brief.

4. Whenever the appellant shall have served his proposed statement of facts or bill of exceptions upon the respondent, the respondent, within ten days after such service, may serve on the proposing party and file with the clerk of the superior court, any amendments which he may propose to the bill or statement or any objections to its certification, and at the expiration of such ten days, shall immediately return to the appellant the copy of the proposed statement of facts or bill of exceptions theretofore served upon the respondent, for use by the appellant in preparing his brief on appeal, and his abstract of record where required. In the event the respondent shall fail to return the said statement of facts or bill of exceptions to the appellant immediately upon the conclusion of such ten days, the appellant may apply ex parte to any judge of the superior court of the State of Washington or any court commissioner within the county for a summary order requiring the return to the appellant by the respondent of the said copy of the proposed statement of facts or bill of exceptions.

5. Except as otherwise provided in subdivisions one, two, three and four hereof, the rules relating to appeals in civil cases shall apply to criminal appeals, but no step in perfecting criminal appeals shall be deemed jurisdictional except those enumerated in subdivision two hereof.

RULES OF THE SUPREME COURT (effective August 1, 1938):

Rule XII, 193 Wash. 14a:

RULE XII

APPEALS IN CRIMINAL CAUSES

1. (a) In criminal causes, in order to initiate an appeal, notice of such appeal to the supreme court shall be given in open court at the time, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry, of judgment or order from which the appeal is taken.

(b) Immediately after the giving of a notice of appeal as hereinbefore provided, the clerk of the superior court shall prepare and transmit to the clerk of the supreme court a certified copy of the judgment or order appealed from, together with a certified copy of the journal entry showing the giving of the oral notice of appeal, or a certified copy of the written notice of appeal, as the case may be, and upon receipt thereof, the cause shall be docketed by the clerk of the supreme court as a part of the state's record.

2. Whenever the appellant shall have served his proposed statement of facts or bill of exceptions upon the respondent, the respondent, within ten days after such service, may serve on the proposing party and file with the clerk of the superior court, any amendments which he may propose to the bill or statement or any objections to its certification, and at the expiration of such ten days, shall immediately return to the appellant the copy of the proposed statement of facts or bill of exceptions theretofore served upon the respondent, for use by the appellant in preparing his brief on appeal and his abstract of record, where required. In the event the respondent shall fail to return the said statement of facts or bill of exceptions to the appellant immediately upon the conclusion of such ten days, the appellant may apply *ex parte* to any judge of the superior court of the state of Washington or any court commissioner within the county for a summary order

requiring the return to the appellant by the respondent of the said copy of the proposed statement of facts or bill of exceptions.

3. No appeal in a criminal cause shall be effectual for any purpose unless the appellant shall, within sixty days after giving notice of appeal as hereinbefore provided, have filed or caused to be filed with the clerk of the supreme court the following:

(a) A statment of facts or bill of exceptions served on the respondent and certified by the judge of the superior court according to the procedure, so near as may be, in civil causes;

(b) A transcript of record certified by the clerk of the superior court, pursuant to the procedure, so near as may be, in civil causes;

(c) Appellant's abstract of record where required by the rules of the supreme court, with proof of service thereof on the respondent;

(d) Appellant's opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on the respondent.

Except as herein otherwise provided, the giving of the notice of appeal and the filing in the supreme court of a certified statement of facts, certified transcript of record, abstract of record, and appellant's opening brief, shall be jurisdictional.

In any case where the proposed statement of facts or bill of exceptions has been filed with the clerk of the superior court within sixty days after giving notice of appeal as hereinbefore provided, but the appellant, through no fault of his own, is unable to have the same certified in time to file the same with the clerk of the supreme court within the time herein specified, the time for such certification may, upon good cause shown, be extended by the chief justice of the

supreme court, or, in his absence, any other judge thereof; and if such extension be granted, said chief justice of the supreme court or judge thereof shall, in the same order, fix the time for filing the appellant's opening brief and abstract of record.

The clerk of the superior court, upon certification shall transmit every statement of facts or bill of exceptions to the clerk of the supreme court forthwith. By lodging the certified statement of facts or bill of exceptions with the clerk of the superior court within the time herein provided, and filing proof thereof with the clerk of the supreme court, the appellant shall be deemed to have satisfied the requirement of paragraph (a) of this subdivision. If not filed within the time prescribed by this rule, the statement of facts or bill of exceptions shall not be considered and no question shall be reviewable on the appeal except the legal sufficiency of the indictment or information.

Whenever an appeal shall be properly filed in the supreme court in accordance with this rule, the clerk of the supreme court shall immediately send a written notice thereof to the clerk of the superior court to be filed as part of the record in said court, and shall simultaneously send a copy of said notice to the attorney for the respondent.

If, upon the expiration of said sixty days after giving notice of appeal, the documents listed in paragraphs (b) and (d) of this subdivision be not on file with the clerk of the supreme court, he shall forthwith, and without the necessity of any notice to appellant or his attorney of record, note the cause upon the calendar of the supreme court for the next motion day as being a cause subject to dismissal for want of jurisdiction under this subdivision, and on said motion day the supreme court shall dismiss the said cause for want of jurisdiction.

4. The respondent shall, within thirty days after the service by the appellant of his opening brief, serve and file with

the clerk of the supreme court his answering brief. Not less than two days prior to the hearing, the appellant may also serve and file with the clerk of the supreme court a reply brief.

5. Except as otherwise provided in subds. 1, 2, 3, and 4 hereof, the rules relating to appeals in civil causes shall apply to criminal appeals, but no step in perfecting criminal appeals shall be deemed jurisdictional except those enumerated in subd. 3 hereof.

[NOTE: Amends former Rule of Practice XVII, first effective March 1, 1935; 178 Wash. xxxvii. Subdivision 1 (b) is new, first effective May 1, 1938. Subdivision 3, last paragraph, is new, first effective May 1, 1938. A defendant in a criminal action need not give a cost bond on appeal. Rem. Rev. Stat., §1721 (P.C. §7295). See *State v. Marcy*, 189 Wash. 493, 65 P.(2d) 1271 (appeal dismissed where statement of facts not filed in the supreme court in sixty days, as required by this rule).]

RULES ON APPEAL (effective January 2, 1951):

Rule 47, 34A Wn.(2d) 53; RCW vol. 0:

RULE 47

CRIMINAL CASE—APPEAL *IN FORMA PAUPERIS*

When the defendant is the appellant in an appeal to the supreme court in a criminal case and shall present to the Chief Justice of the supreme court satisfactory proof by affidavit or otherwise that he is unable to pay the filing fees in such court, the Chief Justice, if in his opinion justice will thereby be promoted, may order the filing of the appeal in this court without cost to the appellant.

Upon like proof that such appellant is unable to pay the expense of printing his brief, or briefs, the Chief Justice may also order the same to be typewritten in compliance with Rule 42(1)(c).

Proposed statements of facts in cases wherein the death penalty has been imposed shall, when the appeal is prosecuted *in forma pauperis*, be furnished to appellant at the expense of the county.

APPENDIX B

REPORT OF SPECIAL COMMITTEE OF SUPERIOR COURT JUDGES ASSOCIATION APPOINTED TO STUDY *GRIFFIN v. ILLINOIS*

SUPERIOR COURT JUDGES' ASSOCIATION
822 County-City Building
Seattle 4, Washington

February 28, 1958

Mr. Robert W. Graham
Bogle, Bogle & Gates
603 Central Bldg.
Seattle 4

Dear Sir:

I enclose herewith for your reference and use a copy of a report of a special committee of this Association appointed to study the case of *Griffin v. Illinois*. This special committee, appointed by the President-Judge of the Association, consisted of the Honorable Theodore S. Turner, chairman; the Honorable Hugh Todd and the Honorable H. G. Sutton, all members of the Superior Court bench of this state.

The report was received at the last annual meeting of the Superior Court Judges' Association on August 30, 1957. You are welcome to make any use of it that you desire.

Very truly yours,

EUGENE A. WRIGHT, Secretary.

EAW:1/Enc.

REPORT OF SPECIAL COMMITTEE APPOINTED TO STUDY *GRIFFIN v. ILLINOIS*

HONORABLE HOBART S. DAWSON, President-Judge:

We, your special committee appointed to study and report on *Griffin v. Illinois*, 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585, have construed our assignment to embrace an analysis of the holding of the United States Supreme Court and an appraisal of its impact on Washington law. In this report we are not concerned with the merits or criticisms of the variant views expressed in the four separate opinions in the case, no one of which obtained the adherence of a majority of the court.

Griffin v. Illinois held that the refusal of a state to furnish indigent defendants a free transcript of the trial proceedings for use on appeal was, under the circumstances, a violation of the due process and equal protection clauses of the United States Constitution. In that case defendants Griffin and Crenshaw had been convicted of armed robbery in the Criminal Court of Cook County, Illinois. They then moved the trial court that they be furnished the entire record, including a stenographic transcript, without cost to them, alleging that they were indigents and unable to pay for it themselves, that their convictions were invalid because of trial errors, and that such record was necessary to obtain adequate review. These allegations were not controverted by the state. The motion was denied without a hearing. A subsequent petition for similar relief was also denied, and the Illinois Supreme Court affirmed. The United States Supreme Court granted certiorari. In that court, the state conceded that defendants needed a stenographic transcript in order to get adequate appellate review, for the narrative or "bystanders'" bill of exceptions was never used in practice. The court, therefore, had to "assume for the purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get

appellate review of those errors solely because they were too poor to buy a stenographic transcript." A majority of five judges, although recognizing that a state was not bound to provide any appellate review in criminal cases, nevertheless held that if it did so it was not free to administer its law in such manner that only those appellants who could afford to pay for the record could obtain review, while those who had no money were denied any relief. The judgment of the Supreme Court of Illinois was therefore vacated and the cause remanded for further proceedings not inconsistent with the following paragraph:

> "The Illinois Supreme Court denied these petitioners relief under the Post-Conviction Act because of its holding that no constitutional rights were violated. In view of our holding to the contrary the State Supreme Court may decide that petitioners are now entitled to a transcript, as the State's brief suggests. . . We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare." (351 U.S. 19, 20; 100 L.ed. 899).

Four separate opinions were filed. Mr. Justice Black, with the Chief Justice and Justices Douglas and Clark concurring, held that "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance"; that all of the

states now provide some method of appeal from criminal convictions, and that a substantial proportion of convictions are reversed. Many states have provided aid to convicted defendants who "need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (351 U.S. 18, 19; 100 L.ed. 898, 899).

The foregoing language is much broader than necessary to pass upon a timely application for a free transcript in aid of an appeal. It could well be used in aid of a petition for a writ of *habeas corpus* by an indigent convict long after his appeal rights had expired, even though he had not at the time applied for a free transcript. This was recognized by Mr. Justice Frankfurter who filed a separate opinion concurring in the judgment, but expressing the view that this decision announced a new rule which should not be applied retroactively. He says:

> "We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted—as was the timely claim by these petitioners—cannot be asserted now. The answer is too easy. Candor compels acknowledgment that the decision rendered today is a new ruling. Candor compels the further acknowledgment that it would not be unreason-

able for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore it could well be claimed that thereby any conscious waiver of a constitutional right is negatived."

In his view, the court, when announcing a new rule, had power to define its scope and limits, and should in the present case give it prospective application only (351 U.S. 25, 26; 100 L.ed. 902, 903).

Mr. Justice Frankfurter also recognized the right of a state to impose reasonable conditions on its aid to indigent appellants, as follows:

"But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong.

"When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process." (351 U.S. 24; 100 L.ed. 901).

Mr. Justice Burton, with the concurrence of Justices Minton, Reed and Harlan, dissented in an opinion holding that when a state provided appellate review in criminal cases it could make reasonable classifications; that Illinois' classification, which provided a free transcript to indigents in capital cases but not in noncapital cases, was reasonable;

and that the equal protection clause of the Federal Constitution did not require a state to make defendants economically equal before the bar of criminal justice. This opinion also construes the rule announced by Mr. Justice Black to invalidate past convictions where the state failed to furnish a free transcript to indigent defendants who sought to review trial rulings dependent upon the evidence (351 U.S. 27-29; 100 L.ed. 903, 904).

Mr. Justice Harlan filed an additional dissenting opinion contending that the record was inadequate to present the constitutional questions decided, because a reporter's transcript was not necessary under Illinois law, and because even the nature of the alleged trial errors was not disclosed. However, assuming the constitutional questions were properly presented, he felt that the equal protection clause did not require the states to eliminate the effects of differing economic circumstances in the area of criminal appeals, and that the failure to provide a free transcript could not be characterized as so fundamentally unfair as to constitute a denial of due process. (351 U.S. 29-39; 100 L.ed. 904-909).

Additional light on the scope and effect of the *Griffin* decision may be found in subsequent federal and state cases. In the *Griffin* case itself, the Illinois Supreme Court ordered the trial court to provide the defendants with a transcript in full, and allowed them to proceed with their appeal. It also amended its court rules to provide that all persons sentenced after April 23, 1956 (the date of the *Griffin* decisio) would be entitled to a free transcript for use on appeal, on a showing of indigence, and that all indigent prisoners sentenced before that date and desiring review should be provided a transcript at state expense, the rule limiting the time would be inapplicable to them, and their convictions would be reviewed on writ of error. See *People v. Griffin*, 9 Ill.(2d) 164, 137 N.E.(2d) 485; *United States ex rel. Peckham v. Ragen* (CA 7) 241 F.(2d) 318, 320.

In New York, there does not appear to be a decision by the Court of Appeals subsequent to the *Griffin* decision; there are conflicting rulings in the lower courts. See: *People v. Jackson*, 152 N.Y.S.(2d) 893 (transcript granted); *People v. Lumpkin*, 158 N.Y.S.(2d) 610 (denied); *People v. Strong*, 159 N.Y.S.(2d) 351 (granted); same case on rehearing, 159 N.Y.S.(2d) 352 (denied).

In the *Griffin* case, the United States Supreme Court noted that the state did not deny defendants' allegations that reversible error was committed at their trial. It is at least doubtful that the holding would have been any different had the alleged error been denied. This appears from two Supreme Court decisions involving the Act of Congress of June 25, 1910, 28 U.S.C.A., §1915, which provides for an appeal *in forma pauperis* unless "the trial judge certifies in writing that it (the appeal) is not taken in good faith." In the first of these cases, *U.S. v. Johnson* (CA 2), 238 F.(2d) 565, the defendant had been convicted after a five-day trial and sentenced to three years. (The nature of the charge does not appear.) He petitioned for leave to appeal *in forma pauperis*, alleging that "many prejudicial errors were committed against me and I therefore need the records and minutes to present them" to the Circuit Court of Appeals. No particulars concerning the alleged errors were given, nor was their nature disclosed. The trial judge certified that the issues were simple, the jury was properly instructed, the evidence supported the verdict, and that the appeal was frivolous, lacking in merit and not taken in good faith. The Court of Appeals affirmed by a divided court. The majority distinguished *Griffin v. Illinois* because it had assumed reversible trial errors, and held that in the instant case the trial court's certificate that the appeal was frivolous was final, in the absence of a showing that the trial judge acted without warrant or not in good faith. Judge Frank dissented, holding that to deny defendant an opportunity to demonstrate the error was discrimination in violation of

the rule of the *Griffin* case; that defendant was entitled to a transcript or to a narrative statement certified by the trial judge, and to the assistance of counsel. Then follows an extended and well-documented discussion of the problem of making justice available to the poor. The United States Supreme Court granted certiorari and vacated the judgment of the Circuit Court of Appeals; *Johnson v. United States,* 352 U.S. 565, 1 L.ed.(2d) 593, 77 S.Ct. 550. The Supreme Court held that the trial judge's certification that the appeal is not taken in good faith carries great weight, but it is not final in the sense that the defendant is barred from showing that it is unwarranted. The defendant should be afforded counsel in his effort to make such showing, and should be enabled to show that the grounds of the appeal are not frivolous. The court said:

> "This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith."

The second case referred to is *U.S. v. Farley* (CA 2) 238 F.(2d) 575. Defendant had been convicted of bank robbery, and moved for leave to appeal *in forma pauperis.* The trial court denied it, certifying that defendant had failed to show merit in the appeal; the court did not certify that it was not taken in good faith. Defendant then moved the Court of Appeals for leave, alleging several errors not raised below. That court denied the motion, with leave to renew the application in the trial court. Judge Frank concurred in the remand but dissented in part, saying that defendant should have the assistance of counsel appointed by the court, and should be furnished gratis with a transcript or other adequate record. On remand, the trial court appointed counsel

to assist defendant, but did not furnish the record. The trial court denied the motion to appeal *in forma pauperis*, and certified that the appeal was not taken in good faith. Defendant again moved the Court of Appeals, which denied the motion by unanimous vote; 242 F.(2d) 338 (Judge Frank had died in the meantime). This judgment was vacated by the United States Supreme Court: *Farley v. United States*, — U.S. —, 1 L.ed.(2d) 1529, 77 S.Ct. —. The court noted that defendant's allegations of trial errors were denied by the Government, and held:

> "As things now stand conflicting affidavits have been introduced concerning petitioner's contention of errors at the trial. If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous. Before his allegation of errors can be accurately evaluated, however, to ascertain if they do have any merit he should be furnished with a transcript of the trial record—unless counsel can agree on a statement of the relevant facts or some other means are devised to make the minutes of the trial available to petitioner—so that he has an opportunity to substantiate his allegations and point out their significance and so that they can be appraised on a dependable record."

In Washington, our Supreme Court set an early precedent for furnishing a free transcript to an indigent defendant under sentence of death: *State ex rel. Coella v. Fenimore*, 2 Wash. 370.

Legislative authorization for a reporter's transcript at public expense was first enacted in 1913 as a proviso to section 5 of the statute authorizing official court reporters, which has been continued without substantial change to the present time. As last amended, the proviso reads:

> "*Provided*, That when the defendant in any criminal case shall present to the judge presiding satisfactory proof by affidavit or otherwise, that he is unable to pay

for such transcript, the judge presiding, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, which transcript fee therefor shall be paid out of the county treasury as other expenses of the court are paid." (L. 1913, c. 126 §5; L. 1943, c. 69 §4; L. 1957, c. 244 §4; R.R.S. 1943 Supp. §42-5; R.C.W. 2.32.240).

It will be noted that this statute makes no distinction between capital and noncapital cases, and that the furnishing of a transcript at county expense is within the court's discretion. Our Supreme Court has consistently held that it will not interfere with the trial court's discretion in granting or denying a free transcript, unless an abuse is manifest:

State ex rel. Marr v. Superior Court, 163 Wash. 459;

State ex rel. Bird v. Superior Court, 30 Wn.(2d) 785, 788, 789 (death sentence; reporter's transcript refused);

State v. Perkins, 32 Wn.(2d) 810, at p. 866;

In re Mason v. Cranor, 42 Wn.(2d) 610, 614;

State v. Moorison, 43 Wn.(2d) 23, at p. 35.

Since the statute relates to official court reporters, it would apply only in those counties and judicial districts having them. Chapter 244, Laws of 1957, requires the appointment of official court reporters in counties and judicial districts of over 35,000 population, and permits it in any county or judicial district having a population of over 25,000 and less than 35,000. The statute also authorizes the judge in a district having less than 25,000 population to appoint an official reporter if he finds that the work in his district requires. According to the 1950 census, there were then six judicial districts with less than 35,000 population.

Rule 47 of the Rules on Appeal (34A Wn.(2d) 53), relating to criminal appeals *in forma pauperis,* makes a statement of facts at county expense mandatory in cases wherein the death penalty has been imposed; and in other cases it

authorizes the Chief Justice, in his discretion, to dispense with payment of clerk's fees and to permit typewritten briefs. Dispensing with the clerk's fees is also authorized by statute in language similar to Rule 47: See R.C.W. 2.32.080.

To summarize Washington law as announced by statute and court rule prior to the *Griffin* case, it provided that a trial judge must order a proposed statement of facts to be furnished, at county expense, to a defendant who appeals *in forma pauperis* in cases where the death penalty has been imposed. In all other cases arising in judicial districts where there is an official reporter, the trial judge had discretion to order a transcript, at county expense, for an indigent appellant, where in his opinion justice would thereby be promoted. This discretion included not only the right to pass on the sufficiency of the showing of indigence and the form and contents of the statement of facts necessary for review of the claimed errors, but also whether there was a sufficient showing of merit to justify prosecution of the appeal. In judicial districts not having an official reporter, there was no clearly announced policy in cases not capital.

Griffin v. Illinois has made no change in Washington law so far as cases involving the death penalty are concerned. It has not taken away the right of the state, acting through the trial judge, to "protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." (351 U.S. 24). Consequently, if the trial judge determines that there is not a showing of alleged trial errors claimed in good faith to be fatal defects resulting in a potentially reversible conviction, he may deny a transcript at public expense. And it seems obvious that Rules on Appeal 46 and 47 are sufficient to meet every constitutional test in cases where the claimed errors do not involve trial proceedings but appear on the face of the clerk's record. *Griffin v. Illinois* does make a substantial change in Washington law, however, with respect to noncapital cases *in forma pauperis*

in which there is a *bona fide* claim of reversible error and a showing that such record is necessary for appellate review; in such cases, the trial judge no longer has discretion to refuse an adequate record. And this is true, even though the state may deny that there was error or that it was prejudicial.

There is nothing in the *Griffin* decision to deny to the trial court the duty to exercise its discretion in determining whether a reporter's transcript is in fact necessary for an adequate review. Thus, the court may properly require some specification of the claimed error in order to determine whether or not it arises in connection with rulings on evidence or other proceedings at the trial, and if so, how much thereof need be certified in order to obtain adequate review. See Rules on Appeal 34 and 46. And it is clear that where trial errors are claimed, the court has discretion to determine whether a reporter's transcript is necessary or whether a narrative summary or an agreed statement would suffice. A narrative statement, when properly certified to contain all the material facts, matters and proceedings, is sufficient for adequate review, and in such cases a reporter's transcript cannot be compelled: *State ex rel. Miles v. Superior Court*, 13 Wash. 514; *State ex rel. Roberts v. Clifford*, 55 Wash. 440: *State v. Evans*, 145 Wash. 4, at p. 18; *State ex rel. Larpenteur v. Superior Court*, 183 Wash. 252; *Palin v. General Construction Co.*, 45 Wn.(2d) 721. Cf. *Morgan v. Chittenden Land Co.*, 92 Wash. 364.

The foregoing considerations would indicate that when a convicted defendant petitions for leave to appeal *in forma pauperis* and asks for a reporter's transcript at county expense, the following procedure would be proper:

(1) Ascertain whether the claimed errors appear on the face of the record, or arise out of trial proceedings. Incorporate in the record, in some appropriate fashion, defendant's specification of errors claimed, if any, or if none, then the fact that defendant is unable to specify any alleged error.

(2) Where error is claimed with respect to trial proceedings, determine whether it may be adequately shown by summary statement in narrative form, by agreed statement, or whether a reporter's transcript is necessary. Rule on Appeal 34 (3), providing for appeal on a short record, and *id.* 34 (4), relating to appeal on an agreed statement of facts, should be utilized where appropriate.

The North Dakota case of *State v. Moore*, 82 N.W.(2d) 217 (decided April 1, 1957), furnishes support for the foregoing views, and illustrates a situation in which a transcript at public expense may properly be denied. In that case defendant was convicted of murder in the second degree, after a nine-day trial. He moved for a new trial and sought a reporter's transcript to enable him to support his new trial motion, and to use on appeal if necessary; and he filed a pauper's affidavit. The trial judge, in denying the motion for a free transcript, said:

> "In this case defendant has not in the instant motion specifically set out what issues he desires to raise on appeal . . . I know of no prejudicial error in the record . . . It may well be that such issues can be raised by a short statement of the case without a transcript or with only a small portion of the proceedings at the trial and surely so without any necessity of transcribing some eight or nine days of testimony."

On appeal, the question was whether the refusal of a free transcript was a violation of the due process and equal protection clauses. North Dakota law was substantially similar to Washington law with reference to procedure on appeal. The Supreme Court affirmed, saying that not all errors require a reporter's transcript; the judgment roll, a bill of exceptions, or a synopsis of the testimony may be sufficient to provide adequate review. If the errors of which a defendant complains can be made part of the record without a reporter's transcript, his right of appeal would not be limited by the lack of one.

"The requirement, therefore, that an indigent defendant in his application to the court for a transcript, to be prepared at public expense, make some showing that the proceedings, upon which he asserts error, cannot be made a part of the record upon appeal without such transcript, is a reasonable one and does not discriminate against the defendant or deny his equal protection of the law." (p. 220)

The court further held that if the defendant makes a reasonable showing that a transcript is necessary, the North Dakota statute authorized the court to order one for him, but that in the case at bar such a showing had not been made. The court accordingly affirmed.

Respectfully submitted,

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